VOTING RIGHTS EXTENSION ACT OF 1993

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 174

VOTING RIGHTS EXTENSION ACT OF 1993

MARCH 18, 1993

Serial No. 59

Printed for the use of the Committee on the Judiciary

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VOTING RIGHTS EXTENSION ACT OF 1993

THURSDAY, MARCH 18, 1993

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 11:25 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Don Edwards and Craig A. Washington.

Also present: Melody Barnes, assistant counsel; Deborah Ward, secretary; and Kathryn Hazeem, minority counsel.

OPENING STATEMENT OF CHAIRMAN EDWARDS

Mr. EDWARDS. The subcommittee will come to order. We apologize to the witnesses for this session, because we had to delay it for a time.

You came at a very busy time. You had better plan to be here most of the day, because we will be interrupted by votes on the President's economic package and the budget on the floor.

It is a historical time, too, so I am certainly not going to apologize for it. You are here at a very interesting time. We appreciate very much your being here.

I am going to ask Mr. Washington to read my opening statement, since I do have a little problem reading.

Mr. WASHINGTON. Thank you, Mr. Chairman.

The following is the opening statement of Chairman Don Edwards, March 18, 1993:

"Congress intended that the Voting Rights Act of 1965 be used to end voting discrimination in forms known and unknown to us in 1965. Legislators had tired of persistent local and State governments crafting new laws in response to outlawed discriminatory devices.

"They recognized, and the Supreme Court later affirmed, that 'unremitting and ingenius defiance' of the 15th amendment necessitated the passage of a broad and powerful law. Therefore, the Voting Rights Act not only provided plaintiffs with a right of action, but also required certain jurisdictions to obtain approval before altering all voting related laws.

"For many years, the Supreme Court interpreted the Voting Rights Act in a manner that maintained its original intent. Thus, it was both alarming and disappointing when the Supreme Court affirmed *Rojas* v. *Victoria Independent School District*, and later, rendered its decision in *Presley* v. *Etowah County Commission*.

"Both the *Rojas* and *Presley* decisions are evidence of the newest forms of voter discrimination, and the Supreme Court's narrow view of the Voting Rights Act. Though these machinations are new and subtle, their ability to deny minorities the right to representation is undeniable.

"The Voting Rights Act was crafted to address these circumstances. Thus, it is appropriate that we hold this hearing and discuss the problems confronting the Nation."

That ends the statement of the chairman.

[The bill, H.R. 174, follows:]

I

103D CONGRESS
1ST SESSION

H. R. 174

To amend the Voting Rights Act of 1965 to clarify certain aspects of its coverage and to provide for the recovery of additional litigation expenses by litigants.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1993

Mr. EDWARDS of California introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Voting Rights Act of 1965 to clarify certain aspects of its coverage and to provide for the recovery of additional litigation expenses by litigants.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Voting Rights Extension Act of 1993".

SEC. 2. CLARIFICATION OF CERTAIN DEFINITIONS.

Section 14(c) of the Voting Rights Act of 1965 is amended by adding at the end the following:

"(4) As used in section 5, the term 'procedure with respect to voting' includes any change of procedural rules, voting practices, or transfers of decision making authority that affect the powers of an elected official or position.

"(5) As used in section 2, the term, "standard, practice, or procedure" includes any procedural rule, voting practice, or transfer of decision making authority that impairs the powers of an elected official or position.".

SEC. 3. EXPERT EXPENSES.

Section 14(e) of the Voting Rights Act of 1965 is amended by inserting ", reasonable expert expenses, and other reasonable litigation expenses" before "as part of the costs".

O

Mr. EDWARDS. Mr. Washington, do you mind if I tear over and vote, and come right back, and then you can go?

Mr. WASHINGTON. That would be fine, Mr. Chairman.

Mr. EDWARDS. In the meantime, counsel, Ms. Barnes, will read the opening statements, and we are probably going to have to recess around 12 until 1:30. I know some of you have airplane problems, and we will certainly get you aboard.

You may proceed.

Ms. BARNES. The members of the first panel consist of Dayna Cunningham, who has been working in the voting rights field as a staff attorney to the Voting Rights Project, an arm of the NAACP's Legal Defense and Education Funds, since 1989.

Ms. Cunningham, who has extensive experience in voting and civil rights issues, will be giving us an overview of the persistent voter discrimination issues that she comes in contact with on a day-to-day basis.

Charles Cooper served as Assistant Attorney General in the Department of Justice's Office of Legal Counsel from 1985 to 1988. He was Deputy Assistant Attorney General in the Justice Department's Civil Rights Division, prior to that. Mr. Cooper also clerked 1 year for Supreme Court Justice William Rehnquist.

Theresa Gutierrez is our third witness on the first panel today. She is vice president of the Victoria School Board, on which she has served for 8 years.

It was in relation to her position on the school board that Mrs. Gutierrez became a plaintiff in the *Rojas* v. *Victoria Independent School District* case, which is the focus of our hearing today. Thank you for traveling from Texas to be with us.

Ms. Cunningham, you may begin.

STATEMENT OF DAYNA L. CUNNINGHAM, ASSISTANT COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Ms. CUNNINGHAM. Thank you for this opportunity to speak to you about an issue that is a pressing concern to minority voters.

When the Supreme Court decided *Presley* v. *Etowah County* and *Rojas* v. *Victoria Independent School District*, it essentially stripped from minority voters protections that had been afforded ever since the Voting Rights Act was enacted in 1965, which prevented majority-white governing bodies from enacting mechanisms to prevent minority representatives from participating in the governing process.

Legislation is urgently needed to reverse those decisions and to clarify that the Voting Rights Act does, in fact, cover those types of voting discrimination.

Presley and *Rojas* are not isolated examples of voting discrimination. They are not single incidents. They are part of a pattern of voting discrimination that has been with us since before 1965.

In 1965 when the Voting Rights Act was first passed, there were large numbers of physical barriers to voting participation by minorities. So the first generation of voting enforcement involved challenging those physical barriers and giving African-Americans and other protected voters, for the first time, the right to actually walk into a polling place and vote.

Once those barriers began to fall, and minority candidates began getting elected, a second generation of voting discrimination was perceived. That involved the creation of unfair boundaries and other electoral mechanisms to ensure that voters who were now enfranchised, minority voters, no longer had the opportunity to cast a meaningful vote.

So the second generation of voting rights enforcement sought to strike down these unfair barriers and to guarantee the opportunity for minority voters to elect candidates of choice.

With the enforcement of that phase of the Voting Rights Act, we were now seeing larger and larger numbers of minority elected officials, and a new form of voting discrimination becoming more and more prevalent. That was the form of discrimination that is shown in the *Presley* and *Rojas* cases. That is where the governing bodies themselves enact provisions or mechanisms to prevent minority elected officials from participating on an equal basis with whites in the governing process.

I want to make very clear from the beginning that when we talk about a "Presley fix" or a change in the act, or at least a clarification of the act to show that it covers discriminatory changes in the elected officials' authority, we are not talking about trying to legislate substantive outcomes. This is not about trying to give minority elected officials a special edge in the legislative process.

It is simply to say that we have to eradicate barriers to participation in the legislative process, and to ensure that there is equal participation from minority officials as representatives of minority voters in the legislative process.

Without that kind of protection, there is no guarantee that minority voters are consenting to the governing process, because there is no guarantee that the concerns of minority voters are being heard within the governing process. I think the situation in the *Rojas* case really illustrates that.

In *Rojas,* the first Latino is elected to the school board, and suddenly it requires two votes to get an item on the agenda. So unless one of the white members of the school board consents, the minority member can not even put on the agenda for discussion the issues of greatest concern to constituents.

Without that kind of protection, and without the ability to ensure that even if minorities do not support the decisions of government, at least that the concerns of minorities are considered and heard, the fundamental notion of democracy that government exists by the consent of the governed comes into question.

Most importantly, I think, we need to understand that *Presley* and *Rojas* type changes have always been covered by the Voting Rights Act, prior to 1992. There have been a slew of cases, both Department of Justice objections, as well as court cases, where changes in the nature of the elected officials office have been either objected to by the Department of Justice under section 5, or otherwise struck down by Federal courts.

In our research, we have come across about five categories. This is not an exclusive listing, but there are at least five categories of changes that affect the authority or otherwise affect the governing process in which minority officials are involved, that the Justice

Department or the courts have passed on. I am just going to run through them really quickly with some quick examples.

The first two I am going to talk about were recognized by the Supreme Court in *Presley*. It is kind of paradoxical that they can recognize certain types of changes such as shifts of authority away from bodies where minorities are represented to bodies where minorities are not represented. That kind of a change may still be covered under section 5, as well as changes where an elected office that a minority seeks is abolished.

So the Court can still understand those kinds of blatant discriminations, but they can't understand when the effect of changes is virtually identical to that type of change, and the minority elected official, although still sitting on the governing body, no longer has the ability to participate and to carry out the tasks that the constituents have elected him or her to carry out.

In 1974 and in the late 1970's, there was a rash of changes, particularly in rural southern counties, with the adoption of home rule forms of government in majority-white counties. In many of these cases, the counties went to at-large elections of county commissioners when the State legislative delegations were redistricted under the Voting Rights Act. So there was greater minority presence in the State legislative delegation, which otherwise would be controlling the affairs of the county.

So the move to home rule, in many cases, and in at least five cases in South Carolina alone, objected to by the Justice Department in the 1970's, showed at least the potential to shift authority away from a body representative of African-Americans, and toward a body where there was not an African-American voice.

In *Jackson* v. *the Town of Lake Providence*, in 1974, after African-Americans won the majority of the city council, the outgoing incumbents created an all-appointed commission, all white, to control all of the operations of the municipal power authority; thereby taking away a major resource of the governing body, just in time for it to continue to remain in the hands of whites, when an African-American majority takes over in the city council.

I have talked about changes in decisionmaking authority. That is the *Presley* case where the first African-American commissioner is elected since Reconstruction to a majority-white body. As soon as he is elected, he is stripped of his authority to allocate and to spend the budget.

Prior to his election, each commissioner had an individual budget and complete autonomy to decide how that budget was spent. With his election, the county commission decided to make all decisions at-large by majority vote.

The result was, in a racially polarized body, that the one minority commissioner repeatedly was out voted; again, being unable to carry out the tasks that the constituents elected him to perform.

In changes in voting rules, another example besides the *Rojas* decision is a case that the legal defense fund now has in Shelby County, TN, where after the election of four African-American commissioners, the county charter provided for a two-thirds vote for redistricting.

When the four African-American commissioners blocked the two-thirds vote, the remaining white majority simply disregarded the

two-thirds charter requirement, and passed their districting plan by a simply majority.

Under the charter, they would have been required to seek compromise with the African-American commissioners. Instead, they just completely ignored the rule, and went to a simple majority.

Finally, there are additional unanticipated requirements for office holding. There are cases whereupon with the election of an African-American or other minority, the rules of office holding changed so that, for instance, in *Huffman* v. *Bullock,* a case in Alabama in 1981, the first African-American is elected probate judge.

As soon as he is elected probate judge, the county commission decides that it no longer is going to fund the probate judge's staff. The probate judge will now have to pay out of his own pocket for his staff.

These kinds of changes, as you can see from the case cites and from the references to the Department of Justice, were covered by the Voting Rights Act. *Presley* and *Rojas* send a very bad message. They send the message that voting rights enforcement has reached its limits, and that there is nothing wrong with minority exclusion, as long as it occurs in the governing body, rather than in the voting booth.

It is critical that H.R. 174 be passed so that the scope of the Voting Rights Act can be clarified, and that minority political exclusion, wherever it occurs, is outlawed.

Thank you.

[The prepared statement of Ms. Cunningham follows:]

PREPARED STATEMENT OF DAYNA L. CUNNINGHAM, ASSISTANT COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

On behalf of The NAACP Legal Defense and Educational Fund, Inc. I thank you for this opportunity to speak in support of H.R. 174, the Voting Rights Extension Act of 1993.

The NAACP Legal Defense and Educational Fund, Inc, ("the Fund" or "LDF") provides legal representation to African-Americans and other minorities, as well as to other persons in appropriate cases, in litigation to enforce their civil and constitutional rights. The Fund has a long history of involvement in voting rights, particularly in the South. We have litigated numerous cases challenging discriminatory electoral schemes, including registration practices. In 1985, Julius Chambers, Director-Counsel of the Fund, argued in the Supreme Court *Thornburg* v. *Gingles,* 478 U.S. 30 (1986), the landmark case that set out the standard for violation of §2 of the Voting Rights Act as amended in 1982. The following year, in conjunction with attorney James Blacksher, who is here today, LDF brought the *Dillard* cases, see *Dillard* v. *Crenshaw County,* 640 F. Supp. 1347 (M.D. Ala 1986), that successfully challenged discriminatory at-large districting schemes throughout the state of Alabama and led to election of Commissioners Presley and Mack, name plaintiffs in *Presley* and its companion case *Mack* v. *Russell County Commission,* 112 S. Ct. 820 (1992) The Fund has comprehensive practical experience with voting rights issues facing African-Americans.

In *Presley* v. *Etowah County Commission*[1] and *Rojas* v. *Victoria Independent School District,*[2] the Supreme Court ratified decrees of majority white local governing bodies that changed the authority, or operating rules of government in a manner that excluded newly elected minority officials from equal participation in the governing process. In *Presley,* the white majority stripped the first African-American county commissioner elected since Reconstruction of his authority to allocate and spend the budget. In *Rojas,* the anglo majority imposed a virtual gag rule on the first Latina elected to the school board by changing, from one to two, the number of votes

[1] 112 S.Ct. 820 (1992).

[2] Civ. Act. No. V-87-16 (S.D. TX, Mar. 29, 1988) *aff'd* 490 U.S. 1001 (1989).

required to get an item on the school board agenda. In both cases, in an unprecedented narrowing of the scope of the Act, the Supreme Court said that these actions were not prohibited by the Voting Rights Act.

Should the Voting Rights Act be amended now to address the *Presley* and *Rojas* decisions? Why not wait to see if the decisions have an adverse impact on minority voting rights? Congress must not wait because the adverse impact of these decisions already is clear. *Presley* and *Rojas* are not isolated incidents. They form a growing pattern of cases in jurisdictions where minority-sponsored officials win public office and recalcitrant local officials change governmental rules to prevent minority elected officials from participating equally in the governing process.

At the outset, let me make clear that seeking to safeguard equal participation in the governing process is not an attempt to ensure substantive outcomes that are favorable to protected minorities. Restoring voting rights law to its state before *Presley* and *Rojas* will not necessarily affect the outcome of any particular budgetary or school board decision. Rather it will provide protection against unfair obstacles to meaningful minority participation in the governing process. Without such protection, there is no way to ensure that decisions made on behalf of the majority have the consent—even if not the support—of the minority community. The lack of such protection strikes at the very legitimacy of democratic government.

Attempts to thwart minority voter participation in government through their elected representatives are not unexpected or unprecedented in the history of voting discrimination in this country. Congress heard evidence of these attempts by recalcitrant state and local governments as early as 1965 during the initial House hearings on the Act.[3] Such attempts are merely the predictable next "generation" of voting discrimination by local officials who can no longer prevent protected minorities from casting their ballots or from electing candidates of their choice. Both the federal courts and the Department of Justice have forbidden local jurisdictions from obstructing minority voters' political participation in this manner since the inception of the Voting Rights Act. Since *Presley* and *Rojas*, however, this blatant voting discrimination is completely without statutory remedy.

The history of voting discrimination in this country has been a history of "ingenious and unremitting defiance of the Constitution."[4] Supreme Court litigation before the Voting Rights Act demonstrates the variety and persistence of mechanisms used to deprive minorities of the right to vote. For each discriminatory voting mechanism outlawed, a new device was invented to take its place.[5] These devices have evolved through three "generations:" In the "first generation," states and local governments created barriers to ballot access to prevent minorities from even casting a vote.[6] Removal of many of these barriers after 1965 began the "second generation" in which state and local jurisdictions created unfair political boundaries and other

[3] See Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess, at 60 (Testimony of Attorney General Nicholas Katzenbach).

[4] *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

[5] Grandfather clauses were invalidated in *Guinn* v. *United States*, 238 U.S. 347 (1915) and *Myers* v. *Anderson*, 238 U.S. 368 (1915). Procedural hurdles were invalidated in *Lane* v. *Wilson*, 307 U. S. 268 (1939). Discriminatory application of voting tests and qualifications was condemned in *Schnell* v. *Davis*, 336 U.S. 933 (1949). See also, *Alabama* v. *United States*, 371 U.S. 37 (1962); *Louisiana* v. *United States*, 380 U.S. 145 (1965). The white primary was outlawed in *Smith* v. *Allwright*, 321 U.S. 649 (1944). Improper challenges to voting status were nullified in *United States* v. *Thomas*, 362 U.S. 58 (1960). Racial gerrymandering was forbidden by *Gomillion* v. *Lightfoot*, 364 U.S. 329 (1960).

[6] Among the "first generation" barriers about which Congress heard in 1970 were the following: 1) Exclusion of and interference with black poll watchers; 2) refusal to provide or allow adequate assistance for illiterate black voters; 3) withholding of necessary information from black candidates regarding voting or running for office; 4) discriminatory purging or failure to purge voter lists; 5) discriminatory selection of election officials; 6) disqualification of black ballots on technical grounds; 7) harassment of black voters, poll watchers, and campaign workers. See 115 Cong. Rec. 38509 (1969) (statement of Rep. Leggett).

In 1975, Congress heard testimony about the following additional "first generation" barriers to voting: (1) omitting the names of registered voters from the lists; (2) maintaining racially segregated voting lists or facilities; (3) allowing improper challenges of black voters; (4) requiring separate registration for different types of elections; (5) failing to provide the same opportunities for absentee ballots to blacks as to whites; (6) moving polling places or establishing them in inconvenient or intimidating locations; (7) setting elections at inconvenient times; (8) failing to provide adequate voting facilities in areas of greatly increased black registration; and (9) causing or taking advantage of election day irregularities. See Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 645-648 (1975)(statement of Arm and Derfner).

obstacles to ensure that the votes of newly enfranchised minorities would be meaningless.[7] *Presley* and *Rojas* represent this country's "third generation" of voting discrimination.

The Voting Rights Act was passed in 1965 based on an exhaustive record of this history. Section 5's extraordinary preclearance measures, the provisions of the statute addressed in *Presley* and *Rojas*, specifically were directed at local attempts to thwart minority voter participation.[8] When these provisions came up for renewal in 1970, lawmakers learned that "resistance to progress in enfranchisement of qualified Americans has been far more subtle and far more effective than we have thought possible."[9] Volumes of new evidence showed that contempt for the Constitution's voting guarantees was as entrenched as it had been in 1965. It was beginning to take on new forms, however, that focused on diluting or canceling out the votes of newly enfranchised minority voters.[10] Similar findings were made when the Act was extended with broad support in 1975 and 1982.[11]

As early as 1970, the Civil Rights Commission documented three tactics used by local officials seeking to change the nature of elected offices sought by minority candidates:

> 1. Attempts to extend the terms of offices held by white incumbents: Two weeks after the passage of the Voting Rights Act, the Alabama Legislature passed an act to extend for an additional 2 years the terms of office of Bullock County commissioners some of whom were scheduled for reelection. The Negro voting age population in Bullock County is twice that of the white voting age population.
>
> 2. Outright abolishment of offices sought by African-American candidates: In February 1966, a Negro farmer in Baker County, Georgia qualified to run for justice of the peace in his district to succeed to a vacancy created by the death of the incumbent. Within a few days thereafter the Baker County Commissioners voted to consolidate all the militia districts into one district. The effect was to abolish the one office for which a Negro had filed.
>
> 3. Making local elective offices appointive in predominantly black counties but not in predominantly white counties: For many years county superintendents of education in Mississippi were elected at the same time and in the same manner as other county officers. In June 1966, the legislature amended the Mississippi statutes requiring that the office of county superintendent of education be appointive only in certain predominantly black counties. . . . The appointments

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[7] Among the "second generation" barriers that Congress found in 1970 were the following: 1) gerrymandering of legislative districts; 2) switching from district based to at-large elections; 3) consolidating counties; 4) instituting full-slate voting. See 115 Cong. Rec. 38509 (1969) (statement of Rep. Leggett).

In 1975, the list of "second generation" barriers about which Congress heard testimony grew to include the following: (1) requiring a run-off election between the two highest candidates if no candidate wins a majority in the first election; (2) making at-large elections even more unfair to minorities by superimposing various rules that prevent a minority from concentrating its votes to take advantage of a split among the majority group, for example, (a) numbered place laws, which designate each position by a separate number, require each candidate to qualify for a specific numbered place, and allow each voter to vote for only one candidate in each place; (b) staggered terms, which achieve the same end as numbered places, except that the offices are separated chronologically; (3) splitting the vote for a strong black candidate by nominating additional blacks as "straw" candidates for the same office; (4) imposing stiff formal requirements for qualifying to run in primary or general elections, e.g., high filing fees, numerous nominating petitions, or complex oaths; and (5) withholding certification, on technical grounds, of black candidates' nominating petitions. See Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 645-648 (1975)(statement of Arm and Derfner).

[8] Under section 5 of the Voting Rights Act, 42 U.S.C. §1973c, jurisdictions that come under the coverage provisions of section 4 of the Voting Rights Act are forbidden from implementing any voting changes until those changes have determined by the United States Attorney General not to have the purpose or effect of discriminating against minority voters. Under section 2 of the Act, 42 U.S.C. 1973, as amended in 1982, any voting mechanism that results in protected minorities having less opportunity than whites to participate in the political process and to elect candidates of their choice is forbidden. Section 2 applies nationwide.

[9] 115 Cong. Rec. at 38517 (1969) (statement of Rep. Celler).

[10] As one lawmaker observed: "The same states that were the most efficient, determined and malicious in their efforts to keep black people off the registration rolls can be expected to be the most efficient, determined and malicious in the efforts to cancel out the growing black vote. Congress was mindful of this responsibility when it put section 5 into the Voting Rights Act. If there were those who felt that the states covered by the Act would repent and turn from their evil discriminatory traditions in five short years, then those people were overly optimistic and sadly mistaken." [116 Cong. Rec. 6359 (1970) (Statement of Sen. Bayh).]

[11] *See* S. Rep. No. 97-417 at 9 (1982); 128 Cong. Rec. §6943 (June 17, 1982).

were to be made by the county board of education whose members, all white, serve staggered 6-year terms.[12]

In addition, Congress heard testimony about local officials limiting the responsibilities of offices likely to be won by African-Americans and about local officials and others imposing barriers to minority officials taking office, for example, bonding companies refusing to bond African-Americans who had managed to win elections.[13]

These types of voting changes always have been subject to the Voting Rights Act. For example, the Department of Justice objected to the abolition of an elective office a minimum of five times between 1969 and 1975.[14] Under the Voting Rights Act, the federal courts and the Department of Justice have struck down or objected to a variety of other mechanisms that changed the structure or operations of a local governing body. While the Court in *Presley* acknowledged the discriminatory potential inherent in the abolition of an elective office,[15] it refused to recognize this potential in changes in the authority of elected officials that have the same or nearly the same practical effect. These changes have been numerous enough to group into six general categories that I discuss in more detail below: 1) shifts of authority away from a local body that has significant minority representation; 2) creation of an executive position that is elected at large to oversee the operations of a governing body on which there is minority representation; 3) changes in decision-making authority of elected bodies; 4) changes in legislative voting procedures; 5) holding of quasi-official, racially exclusive meetings of white officials to make official decisions and 6) imposition of additional requirements for office-holding. Other examples of *Presley* and *Rojas* type changes do not fit within these categories although they have the effect of obstructing minority participation in government.

SHIFTS OF AUTHORITY

One of the most frequent mechanisms used to shift authority away from local governing bodies with minority representation was the adoption of home rule. In many jurisdictions, a county commission elected at-large was more likely to preserve whites' political monopoly than a local legislative delegation subject to the requirements of the Voting Rights Act. The Department of Justice lodged objections to the adoption of home rule in at least the following jurisdictions, citing the risk that at-large county commissions would be less responsive to the minority electorate: Edgefield County, South Carolina;[16] Sumter County, South Carolina;[17] Horry County, South Carolina;[18] Charleston County, South Carolina;[19] and Columbia County, South Carolina.[20]

Local authorities have used other mechanisms to shift authority away from governing bodies with minority representation. In *Hardy* v. *Wallace*,[21] three months after a redistricting lawsuit that resulted in the election of two African-Americans to the county legislative delegation,[22] the state transferred the power to appoint the local racing commission from the county legislative delegation to the Governor. African-Americans comprised seventy-eight percent of the county. In *Robinson* v. *Alabama State Department of Education*,[23] following passage of the Voting Rights Act,

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[12] *Id.* at 6357 (statement of Sen. Bayh). See *Bunton* v. *Patterson*, 393 U.S. 544 (1969).

[13] 115 Cong. Rec. 38509 (1969) (statement of Rep. Leggett). *See also*, *Id.* at 38502 (statement of Rep. Reid); *Id.*, at 38505 (statement of Rep. Tunney); *Id.* at 38495 (statement of Rep. Ryan); *Id.* at 38517 (statement of Rep. Celler) each discussing various stratagems used by recalcitrant white officials to prevent minority-sponsored candidates from taking office; Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501. Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong. 1st Sess. 645-648 (1975) (statement of Arm and Derfner).

[14] The Department of Justice objected to the abolition of the following elective offices from 1969-1973: 1) Superintendent of Education, Clarendon County, South Carolina (Africans Americans comprised 49% of registered voters) (November 12, 1973); 2) City Clerk, Hollendale and Shaw, Mississippi (African-Americans comprised 70% of populations) (Jul. 9 and Nov. 21, 1973); Justice of the Peace, State of Alabama (Dec. 26, 1972); School Superintendent, State of Mississippi (May 21, 1969).

[15] 117 L. Ed. 2d at 64.

[16] *McCain* v. *Lybrand*, 465 U.S. 236 (1984).

[17] *County Council of Sumter* v. *United States*, 555 F. Supp. 694 (D.D.C. 1983).

[18] *See Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978).

[19] Letter from Drew S. Days III, Assistant United States Attorney General, to Ben Scott Whaley, Esq. (June 14, 1977 objection letter).

[20] Letter from Drew S. Days, Assistant United States Attorney General, to Treva G. Ashworth, South Carolina Assistant Attorney General (February 6,1978 objection letter).

[21] 603 F. Supp. 174 (N.D. Ala. 1985).

[22] *Burton* v. *Hobbie*, 561 F. Supp. 1029 (M.D. Ala. 1983).

[23] 652 F. Supp. 484 (M.D. Ala. 1987).

the Marion City Council transferred control of public schools within the city from the Perry County Board of Education, which was elected at-large from a 65% African-American county, to the City Council, elected from a 52% African-American City. In *Jackson* v. *Town of Lake Providence*,[24] after African-Americans won a majority on the town's governing body, outgoing white incumbents transferred control of the municipal power plant to a newly-created power commission whose appointed members were all white.

In another case not involving an African-American representative, but rather a white elected official who had been responsive to the African-American community's interest, a shift in the official's authority was calculated to punish him. In Austin, Texas, (San Patricio County), after the county clerk assisted the Department of Justice in investigating a voting change submitted for preclearance under section 5, the county attorney retaliated by removing the clerk's responsibility for voter registration.[25]

CREATION OF AT-LARGE EXECUTIVE

In Colleton County, South Carolina, after two African-American candidates were elected to the county school board, which had districts that were identical to those of the county commission, the county created a county supervisor position elected at large from the entire county and shifted all executive authority to this position. In addition, the county expanded the commission to add two additional seats and abolished elections by district. After the Department of Justice's objections were upheld by a federal district court,[26] the county refused to submit an alternative form of government for preclearance. Instead, it sought an additional transfer of authority—to levy school taxes— away from the county legislative delegation. The Department also objected to this second transfer of authority.[27]

After section 2 litigation in Waycross, Georgia (Ware and Pierce Counties), which resulted in the election of the first African-American-sponsored city commissioner, the local legislative delegation abolished the practice of electing the mayor by rotation among the commissioners, and implemented a system directly to elect the mayor by the city at large subject to a majority vote.

CHANGES IN DECISION-MAKING AUTHORITY

The *Presley* case is a clear example of an African-American elected official being stripped of his authority when the white majority voted to make all governmental decision-making collective. In Mobile, Alabama, exactly the reverse strategy was attempted in an effort to bring about the same result. There, in anticipation of a challenge to the at-large system of electing city commissioners, the city eliminated the collective administrative authority of the commission and designated specific administrative functions to individual commissioners. By giving each commissioner discrete individual authority, the city hoped to lock itself into an at-large system of election on the assumption that it would not be appropriate to permit a particular area of the city to elect a commissioner to perform specific functions for the city as a whole.[28]

CHANGES IN LEGISLATIVE VOTING RULES

In the *Rojas* case, the school board adopted new rules to ensure that whites would control the school board agenda. In two cases recently filed or about to be filed, local legislative bodies have changed the voting rules by which decisions were made to ensure that African-Americans have no say in the substantive outcomes.

Tennessee's home rule enabling legislation requires a two-thirds majority vote for the enactment of redistricting plans. During the 1992 redistricting, the four African-American county commissioners out of ten in Shelby County, Tennessee blocked the two-thirds majority needed to enact the plan preferred by the white majority. Rather than comply with the county charter, which would have required them to seek a compromise with the African-American commissioners, the white commissioners

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[24] Civil No. 74-599 (W.D. La. July 11, 1974).

[25] Letter from John R. Dunne to Stan Reid, Esq. (May 7, 1990 objection letter).

[26] *United States* v. *The Board of Commissioners, Colleton County, South Carolina*, C.A No. 78–903 (March 7, 1979, D. S.C.) *See also*, Letter from Drew S. Days, Assistant United States Attorney General to Travis G. Ashworth, South Carolina Assistant Attorney General (February 6, 1978 objection letter).

[27] Letter from Drew S. Days, Assistant United States Attorney General to Travis G. Ashworth, South Carolina Assistant Attorney General (September 4, 1979 objection letter).

[28] Letter from J. Stanley Pottinger, Assistant United States Attorney General, to C.B. Arendall, Esq. (February 26, 1976 objection letter).

passed their preferred redistricting plan by a simple majority, holding the vote among themselves to the complete exclusion of the African-American commissioners. This lawsuit is now pending.

In Haywood County, Tennessee, the County Commission changed the decision-making authority of the County Commission to ensure that African-Americans would not have a meaningful voice on either of the other two county governing bodies—the County School Board and the County Commission itself.

Among its other duties, the County Commission elects the Haywood County School Board. Traditionally, the school board members had been elected by the Commission from residency districts. The County Commission altered its own decision-making authority by abolishing the district system of electing county school board members, and setting up an at-large system. At the same time it set up the racially dilutive at-large election system for the school board, it reconfigured the County Commission districts to ensure that African-Americans would be underrepresented on the County Commission. This pair of changes gave the white commissioners virtually complete control over the election of the school board.

QUASI-OFFICIAL RACIALLY EXCLUSIVE MEETINGS

In *Major* v. *Treen,* 574 F. Supp. 325 (1983), during the 1980 state legislative redistricting process in Louisiana, after conflicts arose between African-American and white legislators over the creation of a majority black congressional district, white legislators held a closed meeting in the subbasement of the statehouse with labor groups and other "interested persons" to fashion a compromise on the congressional district that excluded African-Americans. The African-American legislators were barred from the meeting because, according to one legislator, they had no way of forcing their demand for a black district.[29]

In Altheimer, Arkansas, a small town outside of Pine Bluff, when the second African-American alderperson was elected to the city council in 1990, the city council ceased having official meetings. Instead, the white members of the city council gathered at exclusive meetings by invitation only that were held in the back of the mayor's liquor store.[30]

ADDITIONAL REQUIREMENTS FOR OFFICE-HOLDING

By imposing additional, unanticipated requirements on minority elected officials, recalcitrant local governments have sought to make it difficult or impossible for minorities to serve. For example, in *Shirley* v. *Superior Court in and for County of Apache,*[31] after a Navajo was elected for the first time to the Apache County board of supervisors, local whites required that the official's credentials and fitness to serve be reviewed by the state supreme court before he could be seated.

In Wilcox County, Alabama, the county probate judge, who is charged with issuing commission cards to enable elected constables to perform their duties, refused to issue such cards to newly-elected African-American constables.[32]

In *Huffman* v. *Bullock County,*[33] after the first African-American was elected probate judge in Bullock County, Alabama, the County Commission, which has always paid the salaries of the probate judge's staff, voted to shift responsibility for paying the salaries to the probate judge himself.

This brief catalogue of documented *Presley*-type changes makes clear the risk to minority voters of unchecked local power to obstruct minority representatives' meaningful participation in government. Moreover, scrutiny of such changes is wholly consistent with the comprehensive regulatory scope of section 5. There is little merit in opponents' well-worn retreat to arguments about an opening of floodgates in the wake of a *Presley* amendment. These arguments are based on two fallacies. First, that the Department of Justice could not process the volume of changes that would be submitted under a *Presley* amendment. Second, that Justice Department scrutiny unnecessarily would intrude on states' autonomy.

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[29] [T]he one group, the one contingency that was not going to come out of the session satisfied was going to be the blacks. The reason for this was that with all of the competing interests . . . there was probably going to be virtually no way to satisfy the black members of the Legislature . . . insofar as creating a majority black district [was concerned] . . . they [minority legislators] didn't have enough votes. 574 F. Supp. at 334.

[30] 1990 Interview with Helen Alexander, Alderperson, Altheimer, Arkansas.

[31] 109 Ariz. 510, 513, P.2d 939 (1973), cert. den. 415 U.S. 917 (1974).

[32] *See,* United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After* at 169 (1975).

[33] 528 F. Supp. 703 (M.D. Ala. 1981).

In the Department's *amicus curiae* brief and in oral argument before the Supreme Court in *Presley*, the Attorney General indicated that section 5 coverage of potentially discriminatory changes of legislative authority or rules would not present undue administrative burdens.[34] In light of his/her experience in enforcing the Voting Rights Act, the Attorney General's view of the Act is due considerably greater deference than are the speculative arguments of those who oppose section 5 protections. Indeed, that opponents' complaints are mere speculation is shown by the fact that prior to the *Presley* and *Rojas* decisions, changes in the authority of elected officials or in legislative rules that had the potential to discriminate were systematically reviewed by the Department of Justice without undue administrative burdens.[35]

The Department of Justice has a comprehensive administrative mechanism that is well-equipped to carry out its enforcement responsibility under section 5 to review "all changes, no matter how small" that have the potential to discriminate.[36] Under this command, the Department capably reviews voluminous changes including every change of polling places from one side of a street to the other,[37] every change in candidate filing fees[38] and every change from paper ballots to voting machines[39] that is submitted from every covered jurisdiction. Surely the Department effectively can process—as it did before 1992—the *Presley*-type changes that may have a discriminatory impact on minority voters.

Moreover, arguments about undue intrusion on state autonomy by section 5's enforcement scheme were resolved 28 years ago when Congress enacted the provision. Congress determined, after finding that other mechanisms to enforce the fifteenth amendment's voting guarantees had been wholly ineffective,[40] that close monitoring under section 5 of local voting practices was the most effective way of preventing states from enacting new discriminatory voting mechanisms each time an existing voting barrier was removed. Thus it chose to "shift the advantages of time and inertia from the perpetrators of the evil to its victims"[41] by forbidding implementation of voting changes in covered jurisdictions without federal approval.[42] Section 5 does not cover every state. Rather, it covers those states expressly identified by Congress as those with a documented history of egregious race-based voting discrimination.[43] As to these states, Congress made the judgment that state autonomy cannot shield practices that have the potential to discriminate against minority voters.

CONCLUSION

Despite the many enforcement gains of the Voting Rights Act, racial discrimination in voting is still not a thing of the past. *Presley* and *Rojas* create a huge exception to the coverage of the Voting Rights Act precisely at the point where protected minorities are actually in a position to participate in the governing process. The majority of the cases described above were brought under section 5 of the Voting Rights Act. All of the cases also would have been subject to section 2 challenge. Many never required litigation because the Department of Justice intervened before the changes were implemented. *Presley* and *Rojas* send precisely the wrong message to recalcitrant local jurisdictions that continue, whether intentionally or not, to enact discriminatory voting measures. The message is that voting rights enforcement has reached its limits and that barriers to minority political participation are okay as long as they exist within the legislature, rather than at the voting booth. For this reason, I strongly urge that Congress pass H.R. 174 to restore Voting Rights Act protections against minority political exclusion wherever it may occur.

Mr. WASHINGTON [presiding]. Mr. Cooper.

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[34] *See Presley* v. *Etowah County*, 117 L.Ed. 2d 51, 70, nn.5, 6 (1992) (Stevens, J., dissenting).
[35] *Id.*
[36] *Allen* v. *State Board of Elections*, 393 U.S. 544, 568.
[37] *See Perkins* v. *Matthews*, 400 U.S. 379 (1971).
[38] *Dougherty County Board of Education* v. *White*, 439 U.S. 32, 40, n.9 (1978).
[39] *See* 393 U.S. at 568.
[40] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 314 (1966).
[41] *United States* v. *Sheffield Board of Commissioners*, 435 U.S. 110, 121 (1978).
[42] Covered states are required to submit for preclearance "any state enactment that alter[s] the election law in a covered State in even a minor way." 393 U.S. at 566. However, Congress substantially reduced the burden on the states by requiring all changes to be precleared automatically within 60 days of submission unless the Attorney General specifically interposes an objection. 42 U.S.C. 1973c. In 1992, the Department reviewed 17,000 changes and precleared 99% of them. This percentage has not changed since 1969. 117 L. Ed. 2d 70, n.6.
[43] *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966).

STATEMENT OF CHARLES J. COOPER, PARTNER, SHAW, PITTMAN, POTTS & TROWBRIDGE

Mr. COOPER. Thank you. I very much welcome the opportunity to present my views to the committee on this important measure, and in doing so, I speak only for myself.

My prepared testimony is brief, but it is too long to try to slog through, and also considering some time constraints that I am personally under.

Mr. WASHINGTON. Without objection, your full statement will be made a part of the record.

Mr. COOPER. Thank you very much, Mr. Washington.

Mr. WASHINGTON. And I turn the gavel back over to the Chair.

Mr. COOPER. I will cut directly to the chase, and the most important point I want to make here to the subcommittee.

However, in doing so, I want to preface my points by saying I think the *Presley* majority did not overstate the sheer dimension of the expansion in the scope of section 5 preclearance burdens and requirements on covered jurisdictions that would be affected if the Justice Department's position in that case had been accepted, and because H.R. 174 seems carefully constructed to mirror the Justice Department's position in the *Presley* case, that H.R. 174 would affect the additional preclearance burdens required under section 5's preclearance requirement.

I think that in the *Etowah County/Presley* majority, its analysis was quite correct, so I don't plan to try to reiterate it here.

I do want, however, to make a point that I do not think the *Presley* majority got into in sufficient detail, Mr. Chairman.

Quite apart from the sheer weight of the preclearance burden that I think H.R. 174 would place upon covered jurisdiction, the measure, to me, is objectionable, because it would operate to freeze existing government structures and allocations of power in many covered jurisdictions, no matter how pressing the need for change.

A covered jurisdiction is entitled, as this subcommittee well knows, to preclearance under section 5 only if it can demonstrate that the proposed change does not have the purpose and will not have the effect of denying or bridging the right to vote on account of race or color. The discriminatory effect prohibited by section 5 has been defined by the Supreme Court in terms of retrogression.

Let me quote now, from the *Beer* case, from which the standard was established. "The purpose of section 5 has always been to ensure that no voting procedure change would be made that would lead to a retrogression in the position of racial minorities with respect to the effective exercise of the franchise.

"Under standard retrogression analysis, any measure reducing the authority of an elected official or body controlled by a racial minority constituency would have a discriminatory effect prohibited by section 5.

"For example, a State statute withdrawing, say, a particular taxing authority"—and here you can insert your own favorite authority: taxing, spending, program administration, budgetary, or any conceivable government official authority. But again, assume that the State statute withdrawing—"a particular taxing authority from the county commission of a majority-black county would clearly be retrogressive.

"If the change were subject to section 5's preclearance requirement, therefore, it would be objectionable and could not be implemented. The measure would be barred, regardless of its importance to the public good, and regardless of the strength of its public support.

"Indeed, even if the measure enjoyed widespread support among the county's black population, it would nonetheless violate section 5's 'effects' test. Nor would it matter that the measure applied uniformly to every county in the State. It would not be implemented in any county with a majority-black electorate."

The same analysis would apply at the county and municipal levels. Thus, county and municipal elected officials with constituencies controlled by a racial minority could not, consistent with section 5's effects test, have their decisionmaking authority reduced or otherwise adversely affected. The reason for the reduction in decisionmaking authority would be completely beside the point, no matter how race neutral, no matter how pressing.

The retrogression analysis outlined in the foregoing remarks would not be limited to allocations of decisionmaking authority among elected officials acting in an executive or legislative capacity. The Supreme Court has made it clear that section 5 covers changes in electoral laws relating to judges no less than to other elected officials. Thus, H.R. 174 would apply to elected judges no less than it would apply to other elected officials.

Accordingly, a State statute that, for example, eliminated or restricted the preexisting jurisdiction of the State's trial level judges would be retrogressive, and thus barred under section 5, in any judicial district with a majority-black electorate. Indeed, one can readily imagine State supreme court decisions that would be embraced by section 5 if a H.R. 174 is enacted.

For example, a State supreme court decision overruling an earlier decision finding jurisdiction to adjudicate certain disputes in the elected judges of a particular State court would presumably constitute a "transfer of decisionmaking authority that affects the powers of an elected official." That's quoting from H.R. 174.

The State supreme court decision, therefore, would have to be submitted to the Department of Justice for preclearance under section 5, and its implementation would no doubt be barred with respect to judges with majority-black constituencies.

Finally, contrary to the Justice Department's assertion in its amicus brief in *Presley,* subjecting countless changes in the governing authority of elected officials to section 5, preclearance review is not necessary to ensure that covered jurisdictions do not "negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence."

If such racially motivated conduct occurred in a jurisdiction that is not covered by section 5's preclearance requirement, its victims would obviously not be without a remedy. Rather, the transfer of decisionmaking authority, based on the race of an elected official or his constituents would obviously violate the 14th amendment, and would be promptly enjoined in an appropriate judicial action.

It is for these reasons, Mr. Chairman, that I think amending section 5 along the lines that are suggested in H.R. 174 would be ill-advised. Therefore, I am testifying in opposition to it.

Thank you very much.

Mr. EDWARDS [presiding]. Thank you very much, Mr. Cooper.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF CHARLES J. COOPER, PARTNER, SHAW, PITTMAN, POTTS & TROWBRIDGE

My name is Charles J. Cooper, and I am a partner in the Washington, D.C. law firm of Shaw, Pittman, Potts & Trowbridge. I welcome this opportunity to present my views on H.R. 174, the "Voting Rights Extension Act of 1993;" in so doing, I speak only for myself.

My experience with respect to the Voting Rights Act dates back to 1981, when I joined the Civil Rights Division of the U.S. Department of Justice as a Special Assistant to the Assistant Attorney General. In that capacity and, later, as a Deputy Assistant Attorney General, I was closely involved in the Justice Department's enforcement activity under the Voting Rights Act, including the review of preclearance submissions by covered jurisdictions under Section 5 of the Act. From 1985 until 1988 I served as the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice and continued to participate in the formulation of the Departments position in Voting Rights Act cases before the Supreme Court. In private practice I have represented both plaintiffs and defendants in litigation brought under various provisions of the Voting Rights Act, and I have represented a number of state and local government bodies and officials both in litigation and administrative preclearance proceedings under Section 5 of the Act.

I shall confine my testimony today to the provision of H.R. 174 that is designed to reverse *Presley* v. *Etowah County Commission,* 112 S. Ct. 820, 60 U.S.L.W. 4135 (1992), in which the Supreme Court held that changes in the decisionmaking authority of elected officials and bodies are not covered by Section 5 of the Voting Rights Act. Section 5 of the Voting Rights Act requires that certain covered jurisdictions must obtain preclearance before implementing any change in a "standard, practice, or procedure with respect to voting." H.R. 174 would amend Section 5 to make clear that the term "procedure with respect to voting" includes "any change of procedural rules, voting practices, or transfers of decisionmaking authority that affect the powers of an elected official or position."

At issue in *Presley* were changes in the governing structures in two Alabama counties, Etowah County and Russell County.

Russell County. Prior to 1979, the Russell County Commission consisted of five members elected at-large from "residency districts." Two of the commissioners were required to reside in Phenix City, the largest city in the county, while three commissioners were elected from rural residency districts. The three rural commissioners had individual authority over road and bridge repair and construction within their districts and directed the operations of the districts "road shop," including authorizing expenditures for routine repair and maintenance work. Funding for new construction and major repair projects was subject to a vote by the entire commission. The rural commissioners were assisted by a county engineer, appointed by the commission.

In 1979, following the indictment of a rural commissioner for corruption in his road work activities, the Alabama Legislature enacted a statute transferring all responsibility for road work to the county engineer. A resolution accomplishing the same result had also been passed by the commission. Neither the resolution nor the statute was submitted for preclearance under Section 5 of the Voting Rights Act.

In 1985 a consent decree was entered in federal district court to resolve claims brought against the Russell County commission under Section 2 of the Voting Rights Act. Under the decree, the commission was expanded to seven members, with each member elected from a single-member district. In 1986, two black commissioners were elected.

Etowah County. Prior to 1986, Etowah County was governed by a five-member county commission, four of whom were elected at-large from residency districts; the fifth member, the chairman, was subject only to the requirement that he reside somewhere in the county. Each of the four "road commissioners" individually supervised the maintenance of roads and bridges within his district and directed the operations of the district's "road shop." The commission as a whole allocated funds among the four road districts, but the individual road commissioners controlled

spending priorities within the districts. In 1986, the Etowah County Commission entered into a consent decree to resolve claims brought under Section 2 of the Voting Rights Act. Under the decree, the commission was expanded to six members elected from single-member districts. The initial elections held under the new system involved only the two additional districts. A black commissioner was elected from one of the districts, and both new commissioners joined the four holdover commissioners in January 1987. In August 1987 the Etowah County Commission passed a resolution abolishing the prior practice of allocating funds to the separate districts for disposition by the district's commissioner. Under the "Common Fund Resolution," all funds earmarked for road work were to be expended by the commission as a whole, "in accordance with need." The Common Fund Resolution was not submitted for preclearance under Section 5.

The District Court's Decision. In 1989, an action was filed in federal district court alleging racial discrimination in the conduct of road operations in Etowah and Russell Counties in violation of prior court orders, the Fourteenth and Fifteenth Amendments, Title VI of the Civil Rights of Act of 1964, and Section 2 of the Voting Rights Act. The complaint was later amended to allege that the counties had violated Section 5 of the Voting Rights Act by failing to preclear their transfers of authority over the county's road work from the individual commissioners to the county engineer (in Russell County) and the commission as a whole (in Etowah County).

A majority of the three-judge district court, in an opinion authored by Circuit Judge Frank Johnson, held that neither transfer of road work authority constituted a "covered change" subject to preclearance under Section 5. Appendix to Jurisdiction Statement in No. 90-711, at A1-A41. The district court held that transfers of authority are subject to Section 5 preclearance only when they "effect a significant relative change in the powers exercised by governmental officials elected by, or responsible to, substantially different constituencies of voters." *Id.* at A13-A14. The district court added that "minor or inconsequential" transfers of authority are not subject to Section 5 preclearance even when the transfers involve officials with different constituencies.

With respect to Etowah County, the district court held that "the reallocation of authority embodied in the common fund resolution was, in practical terms, insignificant" since the commission as a whole had the authority, "both before and after the disputed change," to "allocate funds among the various districts, and thus to effectively authorize or refuse to authorize major road projects on the basis of a county-wide assessment of need." *Id.* at A19. Similarly, Russell County's transfer of road work authority from the individual rural commissioners to the county engineer was not subject to Section 5 preclearance because both the commissioners and the engineer were answerable ultimately to the same constituency—the voters of Russell County. *Id.* at A16-A18. The county engineer is appointed by and thus responsible to the commission, which in turn is responsible to all county voters. *Id.* at A16-A17.[1]

When the case reached the Supreme Court, the Department of Justice, as *amicus curie* supporting appellants, attempted for the first time to articulate a standard for distinguishing a change in the authority of an elected official or body that is covered by Section 5 from one that is not. Prior to the *Presley* case, the Justice Department had taken the cryptic position that some, but not all, changes in the authority of an elected official or body must be precleared under Section 5, but it had refused to provide any guidance on how to determine which changes were covered and which changes were not. Covered jurisdictions were simply forced to guess at where the Justice Department would draw the line. Indeed, as recently as 1987, when the Department promulgated regulations under Section 5, it consciously decided not to provide guidance on the issue to covered jurisdictions. As the Department explained: "While we agree that some reallocations of authority are covered by Section 5 (*e.g.*, implementation of 'home rule'), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way." 52 Fed. Reg. 486, 488 (1987). Not until the Supreme Court took up the issue in *Presley* was the Department, after 27 years of administering the statute, able or willing to identify "a sufficiently clear principle . . . distinguishing covered from noncovered reallocations" of authority between elected officials.[2]

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[1] District Judge Thompson dissented from the majority's conclusion that transfers of authority are covered by Section 5 only when they occur between officials with different constituencies. *Id.* at A35-A36. Judge Thompson concluded that preclearance is required when "there has been a *significant* and *fundamental* change in the nature of the duties traditionally exercised by elected officials." *Id.* at A38 (emphasis in original).

[2] The Department's case-by-case application of Section 5 in this area has been inconsistent. Indeed, in one case the Department has changed its position no fewer than three times. In

And the principle finally offered by the Justice Department to the Supreme Court in *Presley* was sweeping indeed. According to the Department, any change "that implicate[s] an elected official's *decisionmaking authority,*" no matter how seemingly "minor or inconsequential," is covered by Section 5. U.S. Brief at 18, 10 (emphasis in original). Preclearance is required, in other words, for "[c]hanges that affect an elected official's authority to make decisions—to legislate, tax, spend, set school curricula, approve road and bridge projects, and so forth . . . ." *Id.* at 18. Under the Justice Department's test, therefore, any structural or substantive change relating in any way to *governance* would be subjected to federal oversight before it could be implemented.[3]

The Justice Department's position in *Presley* rested more on policy than on law. Its principle legal argument was based not on Section 5's language or legislative history, but on the Supreme Court's statement in *Allen* v. *State Bd. of Elections,* 393 U.S. 544, 566 (1969), that in enacting Section 5, "Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." Because the Court in *Allen* rejected a *de minimus* exception to Section 5's coverage, the Justice Department argued, any transfer of decisionmaking authority among the elected officials must be subject to preclearance. As the Supreme Court noted, the Department's argument simply "assumes the answer to the principle question in the case: whether the changes at issue are changes in voting, or as [the Court] phrased it in *Allen,* 'election law.'" 60 U.S.L.W. 4138.

The Department's policy argument was more persuasive: "If transfers of authority were not subject to preclearance, a jurisdiction could negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence." U.S. Brief at 14. Nowhere in its brief, however, did the Justice Department acknowledge the policy drawbacks of its argument; namely, that subjecting all legislative changes that affect an elected official's decisionmaking authority to Section 5 preclearance no only would work a breathtaking expansion of the preclearance burden on covered jurisdictions and the Justice Department, but also would operate to freeze existing government structures and allocations of authority in many jurisdictions, no matter how compelling the need for change may be.

Recognizing the "all but limitless minor changes in the allocation of power among officials and constant adjustments required for the efficient governance of every covered State," a majority of the Supreme Court rejected the Justice Department's position as "an unconstrained expansion of [Section 5's] coverage." 60 U.S.L.W. 4139. In rejecting the test proffered by the Justice Department, the *Presley* majority stated:

> Innumberable state and local enactments having nothing to do with voting affect the power of elected officials. When a state or local body adopts a new governmental program or modifies an existing one it will often be the case that it changes the powers of elected officials. So too, when a state or local body alters its internal operating procedures, for example by modifying its subcommittee assignment system, it "implicate[s] an elected official's *decisionmaking authority.*" Brief for United States as *Amicus Curie,* 17-18 (emphasis in original).

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A simple example shows the inadequacy of the line proffered by the appellants and the United States. Under the appellants' view, every time a

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Hardy v. *Wallace,* 603 F. Supp. 174 (N.D. Ala. 1985) (3-judge court), authority to appoint members of a county racing commission was transferred by statute from the county's state legislative delegation to the governor. The Justice Department initially took the position that the statute was subject to Section 5 preclearance. On reconsideration, however, the Department determined that the change was not covered by Section 5. While "it would be wrong to conclude," according to the Department on reconsideration, "that no reallocation of governmental power can ever be considered a change 'with respect to voting,'" the transfer of appointment authority "neither remove[d] the vote from residents of [the] County, nor otherwise impede[d] or in any respect infringe[d] on resident voting rights." *Id.* at 181 (Appendix B to the court's opinion). Now, the Justice Department has changed its position yet again, stating in its *amicus* brief to the Supreme Court in *Presley* that "[f]urther experience with Section 5 has led us to the view that we were right the first time . . . ." U.S. Brief at 15 n.5.

[3] As examples of "[c]hanges that do *not* affect an official's power to make decisions," the Justice Department cited (1) a school board's rule change requiring that items be placed on the board's agenda at the request of two, rather than one, board members and (2) a transfer of authority from a legislative body to a committee to make recommendations concerning proposed legislation. U.S. Brief at 18 & n.7.

> covered jurisdiction passed a budget that differed from the previous year's budget it would be required to obtain preclearance. The amount of funds available to an elected official has a profound effect on the power exercised. [60 U.S.L.W. 4139.][4]

With specific reference to the transfer of road work authority from individual Russell County commissioners to the county engineer, the *Presley* majority noted that while the "making or unmaking of an appointive post often will result in the erosion or accretion of the powers of some official responsible to the electorate," Section 5 was not intended "to subject such routine matters of governance to federal supervision." *Id.* "Were the rule otherwise" the Court concluded, "neither state nor local governments could exercise power in a responsible manner within a federal system." *Id.*

In light of the enormity of the preclearance burden that adoption of the government's position would place on covered jurisdictions, the *Presley* majority felt compelled to "formulate workable rules to confine the coverage of Section 5 to its legitimate sphere: voting." And because changes in the distribution of power among elected officials have no direct relation to, or impact on, voting, the Court concluded that such changes are not covered under Section 5.

I believe that the *Presley* majority correctly perceived the dimension of the expansion in Section 5's scope that adoption of the standard advanced by the Justice Department would bring about. I also believe that the points made by the *Presley* majority in rejecting the Justice Department's position are equally compelling reasons to reject H.R. 174, which appears to have been carefully drawn to codify the standard advanced by the Justice Department in *Presley*.

Indeed, the Justice Department itself appears to be having second thoughts about its position in light of the *Presley* majority's decision. The members of the Subcommittee will no doubt recall the testimony last April of John Dunne, then the Assistant Attorney General for the Civil Rights Division of the Department of Justice. While expressing "disappointment" in the outcome of *Presley*, Assistant Attorney General Dunne was not prepared to endorse legislation overturning *Presley* unless statutory language could be fashioned that would not entail the consequences foreseen by the *Presley* majority. He emphasized his "conviction that it would be very difficult to draw statutory language which would be sufficiently comprehensive but not go far into that world that the [*Presley*] majority was very concerned about, nitpicking, if you will, or second-guessing virtually every decision that some legislative or other governmental body made." Transcript of Testimony of Assistant Attorney General John Dunne at 30 (April 8, 1992). The Justice Department "could not endorse changing the decision in the *Etowah* case," according to Assistant Attorney General Dunne, until it was satisfied "that there is a statute which . . . is sufficiently limited and clearly drawn." *Id.* at 30-31.

Quite apart from the sheer weight of the preclearance burden that H.R. 174 would place upon covered jurisdictions, the measure is objectionable in my opinion because it would operate to freeze existing government structures and allocations of power in many covered jurisdictions, no matter how pressing the need for change. A covered jurisdiction is entitled to preclearance under Section 5 only if it can demonstrate that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c). The discriminatory "effect" prohibited by Section 5 has been defined by the Supreme Court in terms of "retrogression:" "[T]he purpose of 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise." *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

Under standard retrogression analysis, any measure reducing the authority of an elected official or body controlled by a racial minority constituency would have a discriminatory effect prohibited by Section 5. For example, a state statute withdrawing, say, a particular taxing authority (or spending authority, or program administration authority, or any other conceivable official authority) from the county commission of a majority black county would clearly be retrogressive. If the change were subject to Section 5's preclearance requirement, therefore, it would be objectionable and could not be implemented. The measure would be barred regardless of its importance to the public good, and regardless of the strength of its public support. Indeed, even if the measure enjoyed widespread support among the county's black population, it would nonetheless violate Section 5's "effects" test. Nor would it matter

[4] The *Presley* majority rejected as unprincipled the Justice Department's suggestion at oral argument that the Court "draw an arbitrary line distinguishing between budget changes and other changes." [60 U.S.L.W. 4139.]

that the measure applied uniformly to every county in the state. It could not be implemented in any county with a majority-black electorate (although it could be implemented elsewhere, for in a majority-white county it would not constitute "retrogression in the position of racial minorities with respect to their effective exercise of the franchise." *Beer,* 425 U.S. at 141.).

The same analysis would apply at the county and municipal levels. Thus, county and municipal elected officials with constituencies controlled by a racial minority could not, consistent with Section 5's effects test, have their decisionmaking authority reduced or otherwise adversely affected.

The retrogression analysis outlined above would not be limited to allocations of decisionmaking authority among elected officials acting in an executive or legislative capacity. The Supreme Court has made clear that Section 5 covers changes in electoral laws relating to judges no less than to other elected officials. Thus, the provision of H.R. 174 subjecting to Section 5 preclearance "transfers of decisionmaking authority that affect the powers of an elected official or position" presumably would apply to elected judges no less than other elected officials. Accordingly, a state statute that, for example, eliminated or restricted the preexisting jurisdiction of the state's trial level judges would be retrogressive, and thus barred under Section 5, in any judicial district with a majority-black electorate. Indeed, one can readily imagine state supreme court decisions that would be embraced by Section 5 if a H.R. 174 is enacted. For example, a state supreme court decision overruling an earlier decision finding jurisdiction to adjudicate certain disputes in the elected judges of a particular state court would presumably constitute a "transfer of decisionmaking authority that affect[s] the powers of an elected official." The state supreme court's decision, therefore, would have to be submitted to the Department of Justice for preclearance under Section 5, and its implementation would no doubt be barred with respect to judges with majority-black constituencies.

Finally, contrary to the Justice Department's assertion in its *amicus* brief in *Presley,* subjecting countless changes in the governing authority of elected officials to Section 5 preclearance review is not necessary to ensure that covered jurisdictions do not "negate the election of a minority candidate to a governing body by taking away the official's authority and reallocating it to other officials over whom minority voters have less influence." U.S. Brief at 14. If such racially motivated conduct occurred in a jurisdiction that it not covered by Section 5's preclearance requirement, its victims would obviously not be without a remedy. Rather, the transfer of decisionmaking authority based on the race of an elected official or his constituents, whether or not the jurisdiction was covered under Section 5, would obviously violate the Fourteenth Amendment and would be promptly enjoined in an appropriate judicial action.[5]

In sum, then, I believe that amending Section 5 to cover changes in the authority of elected officials in covered jurisdictions is not necessary to reach and proscribe the type of racially discriminatory conduct apparently engaged in by the Etowah County Commission. And amending Section 5 as proposed in H.R. 174 would entail enormous costs, both because it would place massive additional preclearance burdens on covered jurisdictions and because its application, specifically the "effects" test, would prevent the implementation of entirely race neutral measures that would serve the interests of all the electorate, whether black or white.

Mr. EDWARDS. Ms. Gutierrez, we are delighted to have you here. You may proceed.

STATEMENT OF THERESA A. GUTIERREZ, MEMBER, VICTORIA INDEPENDENT SCHOOL BOARD

Ms. GUTIERREZ. Thank you. Good morning.

Thank you for inviting me to testify before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary.

My name is Theresa Gutierrez. I am from Victoria, TX. Victoria has a population of about 55,000. Eight percent of its population is African-American and 38 percent is Mexican-American. Victoria

[5] In addition to the *Presley* case, the report of the House Judiciary Committee on H.R. 5236, an identically worded predecessor to H.R. 174, cites four other cases in which jurisdictions "attempted to divest duly-elected, minority-sponsored officials of their power." H.R. 102-656 at 4-5. Each of the cited cases clearly appears to have involved racially motivated transfers of official authority. No other cases were cited by the Judiciary Committee has justifying congressional action in this area.

is the county seat in Victoria County. It is the largest town in the 225-mile stretch of the coastal bend between Corpus Christie and Houston.

The economic base of Victoria County is oil and gas and petrochemicals. Our agribusiness is cattle ranching. There is a lot of money in Victoria, primarily in the hands of a few rich, old, white families of the area.

A Catholic archbishop had one word to describe our community. The one word he used to describe our community was "racist." I hope that I can convey to this committee the importance of this amendment, and that being elected as a minority to any official capacity is not sufficient if once you are elected to this position, you are stripped of all authority in representing your constituents.

I hope that I can convey to this committee the pain and the agony and the racist attitudes I have been subjected to, irrespective of how I have represented my constituency. I want to convey to them that they still interpret the laws to suit their convenience. Once you are elected and you are dealing with a white majority, they can still look you in the face and say, "We have the votes to do whatever we want."

There is no respect in many of our communities for minority representation. They let you know that they are in control, and they will go to great lengths to diminish your power as an elected representative.

I have been on the board for approximately 8 years. In the 8 years that I have served in this capacity, no one on that board has ever raised any minority issues before the board.

I think that is horrendous. I think that is deplorable. It is horrible what they have done. They think they operate within the scope of the law. They do not. I want to emphasize that they do not operate within the scope of the law.

I also want to inform the board that the student population of our district is 52 percent minority. I was, at the time of the filing, the only minority representative on the board. Our teaching staff is only 24 percent minority.

I hope I can, in some chronological order, convey to the committee how we came to this sorry state of affairs.

In the first 5 months of my term of office, I spent my time in training. That is because the thing that I wanted most of all was to be a good elected representative of the minority community. I did not want them to be embarrassed. I wanted them to know they had a strong representative on the committee.

So I spent the first 5 months of my term in training, becoming aware of the issues. Shortly after that 5-month period, we received an ultimatum from the Justice Department forcing us to desegregate our community.

To tell you the kind of community we have, we had a community that for 17 years refused to desegregate. They refused to desegregate. When you ask the members of the school board why they refused to desegregate, they said, "We do not need the Federal money."

They were not concerned about loss of Federal money. They were not concerned that the moneys were most affecting the minority community. They had no reservation about being this stubborn.

The only reason that I was elected to this board was because we changed our method of district representation. We went to single member districts. If our community had not gone to single member districts, I would not be serving in this capacity now. That is because under the system we had, there was no way that community was going to elect me to any position.

I ran for election to the board in one of the new single member districts in 1985 under the new plan for election. At the time I ran, my district had a minority population of 51 percent Hispanic and 14 percent African-American. I was the first Hispanic female elected to serve on the board of trustees.

At the time that I was elected, I naively hoped that my election would serve to bring the issues and agenda of the minority community of Victoria to the forefront of the school district's business.

Mr. EDWARDS. Can you hold for just a minute? Mr. Cooper, what time do you have to go?

Mr. COOPER. I am afraid I have to go right now, Mr. Chairman. I apologize.

Mr. EDWARDS. Ms. Gutierrez, could you hold on just for a minute.

Mr. Cooper, can you accept some questions? I believe Mr. Washington has some questions.

Mr. COOPER. Yes, certainly. I regret that I am unable to stay here for full questioning.

Mr. EDWARDS. We were very interested in your testimony.

Mr. COOPER. Thank you.

Mr. WASHINGTON. Thank you, Mr. Chairman. I apologize to Ms. Gutierrez. We will get back to your testimony.

The record that you make will be read by a lot of people. From my view, I think it is important that when something is said that will be read, it should be read in context. Mr. Cooper made some statements that I am afraid should not be left in the cold record as they are.

So I want to ask you just a couple of questions, mindful of your time. I do not like submitting written questions because it gives you, frankly, too long to answer.

Let me just ask you a brief couple of questions. The shorter you make the answers, the more we can get in right quick.

Do you believe in this country, Mr. Cooper, that all persons who are of legal age and of lawful authority should have the opportunity to participate in our democracy by having an opportunity to vote?

Mr. COOPER. Of course.

Mr. WASHINGTON. Do you believe that the Voting Rights Act, at least in concept, was in furtherance of that principle?

Mr. COOPER. Yes.

Mr. WASHINGTON. Do you believe in the generally accepted rule of constitutional and statutory construction; that is, that remedial legislation in the area of civil rights is and should be liberally construed?

Mr. COOPER. As a general proposition, yes.

Mr. WASHINGTON. OK. So then, that brings me to this question. How many counties in the United States do you know of that have a black majority? Do you know of any?

Mr. COOPER. I would not be able to cite a case——

Mr. WASHINGTON. So the example you cite was really just for the purpose of making a point. It had no practical reference, did it?

Mr. COOPER. I take it you are informing me that there are no counties in the United States with a black majority?

Mr. WASHINGTON. No, sir. I am saying if you do not know of any, then it seems to me that your example would be theoretical, at best. Do you agree with that?

Mr. COOPER. No, because the example illustrates the point with respect to all levels of government, not just State level of government, with respect to a State statute that changes the authority with respect to lower levels of government or any level of government that operated in that fashion.

Mr. WASHINGTON. I will accept that.

You clerked for the Supreme Court, and you have worked for a law firm now. So you are a lawyer, right?

Mr. COOPER. I am a lawyer.

Mr. WASHINGTON. Let's say you were the lawyer representing a group of Hispanics or a group of African-Americans, and you were making a claim on their behalf. We have one set of rules—say, in the District of Columbia or wherever—and then shortly after the election of one or more minority persons for the first time, the rules appear to be shifted.

Would you not, as a lawyer representing them, at least introduce as testimony, as circumstantial evidence, for whatever purpose it may bear on the issue, the fact that the rules were" X" before there were any minorities and that seemed to work fine. Almost concomitantly and simultaneously with the election of one or more minorities, these rules changed. Wouldn't you be suspicious of those rules?

Mr. COOPER. My mind would leap to the suspicion that the change was racially motivated, was offensive, obnoxious, and unconstitutional.

Mr. WASHINGTON. And wouldn't you hope that a court, in hearing those facts, would at least arrive at the conclusion that there was a rebuttable presumption that such was the case, and then require the person who had made the change to justify some nondiscriminatory reason for making the change, consistent with their ability to do their business?

Mr. COOPER. Well, I am not sure I see the basis for the creation of a rebuttable presumption.

However, I think the facts that you have outlined would create, in a candid mind, the suspicion that would require inquiry. It would require the production of evidence that it was not motivated on the basis of race, but was a measure that was just for all the citizens, and would have taken place without respect to the antecedent facts that you have outlined.

Mr. WASHINGTON. OK, let me go back to that one question. Then I am going to leave you alone, and we will be finished with it.

The reason I used rebuttable presumption was because, as you know, that determines who has the burden of proof.

Isn't it more appropriate for those who have made the change to explain the nondiscriminatory reason for the change, rather than to require those who suffered—for want of a better term and shorthanding it, because you have to go—because of the change?

They have to prove that the change was made, and then make their case before you make the other people prove why they made it.

Isn't that, by definition, what rebuttable presumption is? It doesn't prove anything, but it creates the assumption that without more, with these facts standing by themselves, that these people made this change, using your words, in order to overcome whatever power would be vested in the hands of these people by virtue of their election.

Mr. COOPER. I would have no problem, I don't think, with an evidentiary process that would suggest the facts you have outlined would create a prima facie case of discrimination that then would have to be answered by the defendants, as much as we have in employment discrimination law.

I think where you are going with it, though, is the section 5 process in which the——

Mr. WASHINGTON. No, that is not where I am going.

This is where I am going. As a person who loves the Constitution, and who believes in liberty, and who believes in the Constitution, and the premise that you and I agreed upon, I accept what you say or your critique of this language without more.

What I ask you to do is to send us some language or work with me to find some language that accomplishes that purpose.

I am not hung up on legal niceties. I used to be in another life when I was out there. But here my job is to make sure that what you and I have agreed on happens. In no place in this country must people suffer, even in the District of Columbia, because white people are the minority; or in some rural county in Texas, where Hispanic people are the minority.

That has nothing to do with people having the right—the most precious right, I think, that we have in our Constitution—to vote.

So if this language does not do it, help me work out some language that accomplishes that purpose. Maybe we can scrap the whole Voting Rights Act and rewrite it, and put your name on it. I am not hung up on titles.

I am serious. I am not kidding with you. This is because you and I have agreed that this ought to be the law. When the law does not suit the purposes of mankind, then the law ought to be changed.

Mr. COOPER. Mr. Washington, I would be eager to accept your invitation to work with you, other members of this subcommittee, or anyone else in an effort to ensure that all Americans are protected in their rights to participate fully and fairly in the electoral processes and political processes of this country.

Mr. WASHINGTON. Would you leave one of your business cards with the young lady there who works for me?

Mr. COOPER. I am sure she can get in touch with me. I will be happy to do that.

Mr. WASHINGTON. Thank you very much.

Mr. COOPER. Yes, sir, thank you.

Mr. WASHINGTON. Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mr. Cooper. You have been very helpful.

Mr. COOPER. Thank you. I apologize for having to run along. I apologize to you, Ms. Gutierrez, for the interruption.

Mr. EDWARDS. We have our difficulties, and we apologize for the interruption, Ms. Gutierrez. You may continue.

Ms. GUTIERREZ. You know, I do not remember where I was, but it does not matter. I know where I am going to start here now.

I want to convey how I became at odds with the white majority on my board. I came to odds with the white majority of my board because I raised issues that affected the minority community that they were concerned about.

When we had to desegregate and we were forced to desegregate, the burden of desegregation was placed on my community—the minority community. Of the five schools that they wanted to desegregate, three of them, they suggested to close.

They did not suggest improving the campuses. They did not suggest improving the academic performance of those schools. They suggested closing them.

Then they wanted to build other schools and bus our children to those other schools. Never once in the desegregation that we had to endure did they ever suggest white children should come to our schools, and they should improve those schools. Never once did they molest the white community. All movement of our students had to be out, and they wanted to close schools.

I was the first person in our community that went to the minority community and said," This is what they are going to do to you. This is what they are going to do to your children. They are going to close these schools. They are going to bus your children out."

When the minority community found out what they were going to do, they were incensed. They were outraged that the burden of desegregation was going to be placed, as it always has been placed, on these children and these parents.

So there were three issues we were facing: a Federal desegregation order, a bond program, and—one other issue. Well, at any rate, when I began to be very vocal and express opposition to the way they wanted to handle this, I became at odds with my fellow board members.

They began a systematic process of limiting the flow of information to me, harassing me, and antagonizing me. The board president sent memos that there were so much controversy and so much animosity on the board that they decided to change an existing policy that stated any board member could place an item on the agenda. That policy had existed for years.

Then 7 months after my election, all of a sudden, they had to develop a policy that I had to go to another board member to get permission to place an item on the agenda, knowing full well that there was no member of that board that would support anything I wanted to place on the agenda. They knew that full well.

The chief function of a school board is policymaking. If, in effect, they wanted to strip me of any authority and strip me of any power, that was the way they were going to do it, by effectively changing the policy, and using the excuse that, once we became part of the system and once we became members of the elected body, there was this infighting, controversy, bickering, and there was no harmony.

Well, of course, there was no harmony. This is because, for once, they had someone on the school board that was going to raise those

issues that were most affecting the minority community. Then, all of a sudden, we became part of the process. All of a sudden, we were sitting at the table, raising those issues before the public.

But they passed a policy that said, in effect, that I had to go and ask permission—and beyond asking permission, it had to meet the discretion of the board president, giving the board president the authority to decide yes or no if this item would be placed on the agenda. That is offensive. Of the seven people that sit on that board, there should be equality among the seven. He or she should not have the discretion to decide what items get placed on the agenda.

The only way the voice of the minority community could be heard was by having the ability to place issues before the public so that there could be public debate, and so there could be an awareness and a consciousness to the minority community of what was happening to their children; what decisions were being made at the board table that were directly affecting these children.

It goes beyond the development of a policy that preempts discussion. This is because over and above that, they were not satisfied with just implementing this policy. Of course, it was much to my dismay to find out that the Department of Justice overturned that decision. That meant I had to go out and beat the bushes to find a board member that would rescind this existing policy.

It took me 5 years to find the fourth vote to rescind the policy to its former condition. Even after the policy was rescinded, our board members presently still act as if the policy is in place.

They sit there and still seek out the second and third person to put items on the agenda. As ludicrous as that may be, even after we rescinded the policy, they still act as if it were still there.

Then, adding insult to injury, they are not satisfied with the abuse of power. Then they use "Robert's Rules of Order;" in that, if I place an item on the agenda, I can not initiate a motion. I can not second a motion, because that represents a conflict of interest, because I placed the item on the agenda.

It is so insulting to be able to be in this position of authority, and they twist the law and they twist "Robert's Rules of Order" to suit their convenience.

I explained it over and over again to my counterparts on the board. I said," How can the Hispanic community be a special interest group when they represent 52 percent of our student population?" They are still referring to us as a special interest group. It defies anything that I can believe.

In the American dream, I always thought that if you are articulate, if you work hard, if you are knowledgeable about the issues, if you know about parliamentary procedure, then there would be that courtesy. There would be that respect there.

Yet, I see that, irrespective of your training, irrespective of your experience, irrespective of whom you come to represent, they will still try to diminish and strip away your power. It goes contrary to what the American dream is all about—contrary to what our constitutional rights are all about.

We look to the Justice Department and we look to the Federal Government to protect our rights as a minority community. I can

not emphasize enough that we expect and we look for protection under the law.

This is because there are too many people in our country, once we get that representation, who are looking for finite ways to strip us of our power, to diminish what we can do for our community. That is wrong. That is very wrong.

So we look, with great expectation, to the Department of Justice when we can not protect ourselves, and to bring an awareness of the kind of hardships we have to endure, once we are elected to these positions. We should not have to endure this.

I think it is horrible that I had to wait until last year to finally have elected another Hispanic to the board to be able to second my motions. That is because my white counterparts would not. They will second each other's motion, even if they do not agree with it, just for the purpose of discussion. Yet, for me, they will not. This is such a lack of respect.

So I implore the committee to seriously study the extension. This is because what is happening out there is very real for us and very painful for us, to know that we have come this far, and yet we have so much further to go.

We have a responsibility to represent these people. Every time they diminish our power, it makes a mockery of the system of justice.

I implore your mercy and consideration for an extension of the Voting Rights Act. It means there are so many people out there that are crying for help, that need the help, and we deserve the help. Our children are severely underrepresented.

Thank you.

Mr. WASHINGTON [presiding]. Thank you, Ms. Gutierrez.

[The prepared statement of Ms. Gutierrez follows:]

Prepared Statement of Theresa A. Gutierrez, Member, Victoria Independent School Board

Good morning, and thank you for inviting me to testify before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary on the proposed Presley/Rojas Amendment to the Voting Rights Act, previously filed as H.R. 174.

My name is Theresa Ann Gutierrez. I am from Victoria, Texas, a town of about 55,000, with an 8% African American population and a 38% Mexican American population. Victoria is the county seat of Victoria County, and the largest town in the 225 mile stretch of the coastal bend between Corpus Christi and Houston. Victoria is situated on the Guadalupe River, some 70 miles from the Gulf of Mexico. The economic base in Victoria County is oil and gas (or the petrochemical industry) and agribusiness (primarily cattle ranching.) There is a lot of money in Victoria, primarily in the hands of the few, rich, old white families of the area.

I am a member of the Victoria Independent School Board, and have held that office for eight years. I am before this committee as the school board member affected in the decision in the Rojas v.

Victoria Independent School District case, one of the two cases cited as giving rise to the need for the amendment to the Voting Rights Act contained in the bill previously filed as H.B. 174. I am also the mother of six children, ranging in ages from seven (7) to twenty-two (22). They, and my concern and passion for them and other minority children in Victoria and their need for preparation for adulthood, are what have indirectly led me to this opportunity to testify before this committee. Through much of the past seventeen years, I have been increasingly more involved with the schools in Victoria and, thus, the school district in Victoria, first through the Parent Teachers Associations at the schools my children attended and now as a school board member. For your information, the student population of Victoria Independent School District is 52% minority, but only 24% of the teaching staff is minority.

In late 1984, Victoria Independent School District, moved on its own motion, to change from an at-large system of electing its seven members to the Board of Trustees to one under which five members would be elected from single member districts and two would be elected at-large. The action of the Board was taken under a newly legislated Education Code provision, passed in 1983 in response to the 1982 amendment of the Voting Rights Act, that allowed school boards to choose to elect under one of three systems incorporating at least 70% single member district representation rather than the at-large, numbered place systems used throughout the state.

I ran for election to the Board in one of the new single-member districts in 1985 under the new plan for election. At the time I ran, my district had a minority population of 51% Hispanic and 14% African American. I was the first Hispanic female elected to serve on the Board of Trustees. At the time I was elected, I naively hoped that my election would serve to bring the issues and agenda of the minority community of Victoria to the forefront of the school district's business and concerns so that those issues and that agenda could be fairly dealt with by the Board of Trustees, as the governing body of the school district. Within a matter of months, I learned not only was the Board unwilling to fairly deal with the issues and agenda of the minority community, but the Board also did not want to even hear about the issues and agenda of the minority community.

My first five months on the Board were without event as I concentrated on learning the processes and the business of governing the school district. However, soon after my election to the Board of Trustees, Victoria school district received an ultimatum from the United States Department of Education concerning the racial imbalance or segregation of five of the elementary schools in the district. The school district responded to the ultimatum by determining to close, rather than integrate, three of the district's targeted five elementary schools, all of them neighborhood schools in the minority area of Victoria. The district also voted to call a bond election to construct facilities and additions to schools in non-minority neighborhoods in Victoria

to accommodate the children who would be displaced by the closing of those neighborhood schools and bussed to these other facilities. The district never considered the upgrading of the neighborhood schools and the potential of bussing children in. It only considered their closing, and taking minority children out.

My community, my constituents, were up in arms over the decision of the Board. For seven months, my community organized and fought the issuance of the bonds, blocking preclearance of the bond election at the Department of Justice long enough to delay the issuance of the bonds and the availability of construction funds until after the end of the 1985-86 school year. I was intimately involved in the organizing and vocal in opposition to the bond election. At Board meetings, I was the sole dissent to the board's actions and the lone voice of the minority community. In May of 1986, the Board voted to only close one minority neighborhood elementary school, the one my children attended.

During the controversy over the bond elections, the school district was notified by the Department of Justice that its implementation of the numbered post provision for the election of the two at-large members of the Board of Trustees had not been precleared by the Department of Justice under section 5 of the Voting Rights Act. When the Board refused to submit the numbered post provision for preclearance review to the Department of Justice, the United States filed a Section 5 enforcement action against the district on April 4, 1986, just days before the school board election. A group of minority residents, including close

associates of mine and my husband, sought intervenor status and were allowed to participate in an amici capacity in the litigation. The district ultimately lost the litigation and was forced to abandon the numbered post provision on November 14, 1986.

It was following this activity that the then Board president circulated a memo recommending changes in school district Policy, BE (LOCAL), that would require, at the discretion of the president, two Board members request an item be placed on the agenda for discussion and action at board meetings. The policy had previously allowed any school board member to request an item be placed on the agenda for discussion and action by the Board. Additionally, changes to Policy BED (LOCAL), were recommended. The changes included moving the time for scheduled board meetings to convene from 7:00 p.m. to 5:00 p.m. The effect was to change the open forum section of the meeting, that portion wherein the public is allowed to bring issues of concern before the Board, to a time period immediately following the convening of the meetings at 5:00 p.m., when the working public would be unavailable to attend meetings.

The same day that the memo concerning the need for changes in Policy BE (LOCAL) was circulated by President Johnny Wilson, an interview with Mr. Wilson was published in the local paper in which he discussed the increase in animosity and levels of frustration among Board members since the change to a system of election incorporating single-member districts, some eighteen months before, or basically since the minority community was able to elect a

representative to the Board. A week later, the day of the first reading of Policy BE (LOCAL), Wilson circulated another memo among board members specifically addressing the "controversy" among board members as a problem. Later, in deposition, Wilson defined the source of the controversy referred to in his correspondence as the 1985 proposed closing of the minority schools. Put in other words, the President of the Board had identified action of the Board giving the minority community a voice on the Board as a mistake, and was recommending a way to fix that mistake through his proposed changes in Policy BE (LOCAL).

On November 12, 1986, the board had the second reading of the proposed policy. Members of the public, who were minorities and had participated in the lawsuit filed by the United States against the district, spoke in opposition to the proposed policy. The Board President stated on the record of the public hearing that those three speakers did not represent the people of the city and that the Board would like to hear from some other members of the public rather than the three who had spoken.

On November 14, 1986, the United States district court hearing the Section 5 action filed by the United States against the school district issued its decision finding that the school district had implemented numbered positions for the election of the at-large positions on the school board without the requisite preclearance, and enjoined the board from further implementation of the numbered positions until and unless the change was precleared.

Six days later, the Board passed Policy BE (LOCAL), as

proposed by the President of the Board. My vote was the only dissenting vote. Subsequently, on February 24 and then February 27, 1987, the school district's superintendent sent two memos to me asking that I submit to him in writing any objections I might have to any agenda item prior to the board meetings. No other member of the Board was ever asked to follow such a procedure.

On February 27, 1987, the Department of Justice asked that the school district submit its agenda preparation policy to the department for preclearance review. The Rojas litigation was filed one month later on behalf of Mexican American voters of Victoria school district.

There is no question in my mind or the minds of those people I have represented in Victoria Independent School District that the intent and purpose of the 1986 change in the policy for agenda preparation, along with other changes made to Board policy at the same time, were punishment of the minority community for taking positions contrary to that of the majority members of the Board and their constituents and an effort to silence the lone recent voice of that community on the Board. The school board did not mean to give the minority community access to the process of governance of the school district when it changed the system of election under duress and the threat of litigation. When the majority of the board learned that the minority community would not sit quietly out of gratitude during deliberations, it took measures to cut the community off.

We lost the lawsuit at the district court level because the

district court determined the only effect of the measure was to advance the timing of a second for agenda items, and that such changes were not intended to be covered by the Voting Rights Act. The district court refused to see the real practical effect of the change, that of completely squelching the voice of the minority community. In the appeal before the Supreme Court, the Reynold's Department of Justice changed its position, despite the clear intent of the Board, and took the position that although similar changes might be covered, this particular change was not. As a result, we also lost before the Supreme Court who affirmed the district court's decision.

On the bright side, the litigation resulted in some very broad adverse publicity for the school district. The case was covered on the front page of the New York Times, as well as local Texas papers. The result was that the district backed off full enforcement of the policy for a while. However, the policy remains in place.

Most recently, the policy has been used to block my attempt to request approval of travel expenditures to the April 1992, meeting of the national convention of the National Association of School Boards and the meeting of the National Caucus of Hispanic School Board Members. The Caucus is an affiliate of the National Association of School Board Members, and meets at the same time as the annual convention of the National Association of School Boards. The 1992 meeting was one at which I was to be sworn in as President of the National Association of Hispanic School Board Members, after

recent election.

The National Association of Hispanic School Board Members is an organization that offers networking for representatives of Hispanic constituencies throughout the United States. Its purpose is to promote a consciousness of the specific and inherent problems faced by Hispanic students in public education and to advance the educational opportunities of students, particularly Hispanic students. The organization was formed because Hispanics were unable to break into leadership roles in the parent organization, or to have our issues addressed.

It was necessary to secure school board approval because I had attended a meeting of another organization for which the district had paid. Additional travel expenses, beyond the two pro forma approvals, must be approved by the Board before incurred. I approached another school board member seeking a second to place the item of the payment of my expenses for the trip on the agenda. The member I asked to help me have the item placed on the agenda declined to do so, telling me that Mexican Americans are a special interest group and he would not help me secure funding to advance the interests of a special interest group or to attend their meetings. Again, the specter of racism that underlies the governance of our school district and is ever present in the actions of the Board with regard to the minority community and to me as the representative of that community, raised its ugly head. The refusal of any Board member to help me get the item on the agenda because of the "special interest" nature of my request

became an issue before the Board, with the public again incensed over the actions of the Board in labeling the majority of students in the district, their needs and interests as "special interest" because the children are not white.

I did not ever get the item on the agenda. I found a separate funding source for the trip. The issue of the payment of my travel expenses became incentive for the election of an additional minority representative on the Board. In May of 1992, a second representative of the minority community was elected to the Board, and the problems I have faced since 1986 with getting a second to place items on the agenda that are of concern to my constituents for even discussion, has been resolved. My community is no longer completely shut out of the governance process because issues important to them could not even be brought up in Board meetings for discussion. But for eight years I have endured a special kind of hell that is the result of living in a community so divided on racial and ethnic lines that even after election of a minority representative to the governing body, special efforts continue to disenfranchise that community because the majority refuses to share power with or allow the minority community any kind of equality in government, at the expense of our future and our children. [1]

I am not alone in this experience. I am aware of other kinds of so-called "third generation" efforts of other jurisdictions to

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[1] As an aside, the attorney representing the school district throughout the Rojas litigation had as decorations in his office a confederate flag, a portrait of Jefferson Davis, and an old print of a scene from a slave sale.

continue the disenfranchisement of the minority community, after those jurisdictions have been forced through litigation or the threat of litigation, to provide the opportunity for election of representation to the minority community.

For instance, the Texas Education Association, the appointed agency overseeing education in the state of Texas, and its appointed head, the Commissioner of Education, have now determined that they have the authority to appoint special masters to take over governance of a school district where they find "controversy" among board members. The master, under the agency's regulations, has the power to override or veto actions of a school board that has been selected for a required level of monitoring. The concept has some appeal, but the reality of application has yielded discriminatory results with school districts overwhelmingly targeted for monitoring that have some or a number of minority members elected to the body. The request for the assignment of a master usually comes from a superintendent or the majority members of the board. As a general rule, superintendent positions in Texas are held by Anglos, usually male. The purpose of the monitoring is usually to get board members in line so that the superintendent can maintain control of the board and the district.

Monitors came to Victoria in 1986 and 1987, during the period of the Rojas case. The world was told that I was the reason the district was at risk of losing its accreditation and might be taken over by a master. I am aware that monitors were sent to Dallas Independent School District when African American members of the

Board were loudly protesting actions of the majority white members of the Board about four years ago. South San Antonio Independent School District, with a governing body made up entirely of Mexican Americans, and Isleta Independent School District, also with an entirely Mexican American school board, have been taken over entirely by masters appointed by the Texas Education Agency and the appointed Commissioner of Education in the last two years.

In the county neighboring Victoria, Calhoun County, I have a friend who sits on the city council of Port Lavaca. Port Lavaca, Texas, changed to a six single-member district election system in 1987 as a result of litigation under Section 2 of the Voting Rights Act. Port Lavaca has a 52% minority population, but only elects two minority council representatives.

Elvira Martinez and the other Hispanic council person, Rudy Ramirez, have been sitting on the city council for a number of years now, dealing as I have with a majority community unwilling to share power with the minority community despite the presence of elected representatives on the city council. Recently, an issue arose that required both members challenge the structure of authority within city government. It graphically illustrates the efforts a majority community will undertake to prevent elected minority representatives from effectively representing their constituencies and from participating in the governance process.

The City Secretary, the person who records all city council meetings, maintains city records, and runs city elections, went to inspect a city owned building that had been rented to a Spanish

language radio station for the purpose of sponsoring a promotional dance for a Tejano band to which tickets were sold. The attending crowd, a record breaker for this community of 3,000 people, was primarily Mexican American. The City Secretary refused to refund the station's deposit on the building allegedly because of the "condition" of the grounds and the building. It was not the refusal for refund that created the problem, however. It was the reference of the City Secretary to the crowd that attended the dance as "undomesticated animals."

Both Ms. Martinez and Mr. Ramirez took strong positions calling for an immediate public apology by the City Secretary, and attempted to schedule the matter for a public hearing before city council. Their efforts were met with complete frustration by the Anglo city manager and city attorney. The efforts of Ms. Martinez and Mr. Ramirez to call a special meeting of the city council was completely rebuffed by the city manager and city attorney, who informed the two council members that they could not call such a meeting. The city charter specifically provides that two or more council members can call a special city council meeting. The previous week, a single Anglo city council member had on his own called a special city council meeting.

After several frustrating weeks of attempting to have the matter addressed by the council in either a public meeting or an executive session, the council finally agreed to address the matter in executive session. The city secretary then elected to take the meeting the issue to a public meeting at that point. The city

attorney and the city manager, however, cautioned both minority council members that they could not address the issue in the public meeting because the city would be subject to liability to the city secretary if they did. Texas Open Meetings Act provides that once the election is made by an employee to have such a meeting held in public, the council is no longer restricted by the rules that apply to an executive session.

At the public hearing, the city attorney and the city manager informed the public that the city secretary position, a position exempt from all personnel rules that govern other non-exempt employees, had to be treated like all other employees under the rules governing city personnel, and again publicly cautioned the minority members of the council with regard to libelous statements.

In the context of the meetings leading to the final public hearing, both Ms. Martinez and Mr. Ramirez have been told to shut up and sit down when attempting to address comments made in the public forum portion of the meeting and have been refused the opportunity to speak regarding agenda items before the council by the city attorney and other members of the council.

Ms. Martinez, in her capacity as a city council member, has attempted to access, among other information, EEO-1 reports for the city, bills paid by the city to the law firm contracted to represent the city, and information with regard to the demotion of the Mexican American who was chief of police and the hiring of his Anglo replacement. Recently, Ms. Martinez was told by the city manager that her access to public records of the city would require

a deposit for and eventual full payment of the personnel time required to search for and copy, if copying was sought, and any copying costs for any further requests made by her.

In short, the powers of these minority city council members have been totally obliterated by the city manager and city attorney, with the acquiescence of the Anglo members of the city council. An amendment to the Voting Rights Act, as proposed in H.B. 174, would provide an avenue for the voters who elected these representatives to counter the almost complete disenfranchisement they have suffered as a result of the actions of the Anglo majority of the council.

In San Patricio County, Texas, a year after the Rojas case was filed, the County Commissioners' Court, the governing body of the county, determined to cut the budget for three of the six justices of the peace in the county, as well as to consolidate the justice of the peace positions. County Commissioners courts in Texas has five members, four elected from single member districts and one elected at-large. In San Patricio County, two members were Mexican American, and three were Anglo. San Patricio County has a 53% minority population. Likewise, Justices of the Peace are elected from single member "like" districts of which there are six in San Patricio County.

The proposal of the County Commissioners followed on the heels of the election of a third Mexican American to a Justice of the Peace position in the county. The three budgets proposed for reduction were those of the Hispanic justices. The consolidation

proposed would pair two of the precincts that elected Mexican American justices of the peace creating one precinct to elect one justice of the peace, and the remaining precinct that elected a Mexican American justice of the peace was proposed to be consolidated with a precinct electing an Anglo justice of the peace.

The County Commissioners asserted as their justification for cutting the budgets of the Mexican American Justices of the Peace the need to cut unnecessary expenditures by the county, despite the fact that all three justice of the peace offices produced revenue far exceeding the expense of maintaining their offices, and in fact included three of the top four revenue producing justice offices in the county. The effect of the reduction of the budgets for those offices was to effectively eliminate all work handled by those offices, except the processing of state highway patrol citations. Each justice was required to handle his or her own clerical work as well as the other duties of the office. Based on new standards of measuring productivity also instituted by the county in this budget reduction process, the justices of the peace were required to maintain or exceed the level of revenue and cases handled by their offices prior to the proposed budget reduction. The budget reduction created a level of stress for each of the affected justices that caused weight loss and physical disorders, reduced their overall productivity and hours of operation, and significantly reduced their accessibility to their constituents.

A lawsuit was filed asserting both changes in the number of

the justice of the peace positions and the budget reductions were changes under Section 5 of the Voting Rights Act. The reduction in the number of precincts was objected to by the Department of Justice. The remaining issue in the case, the budget reduction, was fully briefed and presented to the three judge court in 1987. The judges, all Reagan appointees, sat on the case until early last year after the Presley decision was issued by the Supreme Court. Then they dismissed the action. Again, the third generation voting rights violations presented by this case would have been covered under the proposed amendment to the Voting Rights Act, and the voters and elected officials of San Patricio County would have been protected. [2]

Since I was asked to testify before this committee, I have learned of several other situations in the state where the creativity of the jurisdiction has imposed a burden on the recently elected minority representatives diminishing their ability to represent their constituents or has diminished the power and authority of the offices to which minorities, after complete exclusion, have finally succeeded in gaining access to representation. The examples I have cited are by no means

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[2] An aside in this case, the county judge, the presiding member of the county commissioners' court, created a position in the county of loss control manager for a buddy of his to be hired into. That position was responsible for curbing worker's compensation claims by county personnel. That position later evolved into personnel manager. As personnel manager, this employee decorated his office with a framed Ku Klux Klan hood. The county judge testified in deposition that he saw no problem with the display of a historical artifact like that in his personnel manager's office.

exhaustive, they are simply representative of the struggle that continues for minority voters to achieve equal access to the electoral process and representation, even after achieving the right to elect people to office.

While these cases are not as rampant as the cases where minorities have been completely excluded from office because of the use of discriminatory electoral systems, there simply must be some provision in the law to allow for redress where those instances occur. From my own personal experience, I can relate to you the absolute debilitation these kinds of situations have on the elected representative as well as on the community those officials allegedly represent. I can not imagine that Congress passed the Voting Rights Act to provide the opportunity to minority communities only the right to have a face in office or on a board. I think Congress meant for the Voting Rights Act to provide full access to representation and the political process to minority members of society, including having representatives function wholly and completely in the offices to which their constituents have elected them, without diminution, harassment, or burdens beyond those that their Anglo counterparts experience.

My eight years on the Victoria School board have been very hard, for me, for my family, for my constituents, as issue after issue has been rebuffed, ridiculed, or dismissed, by the Anglo majority. Fortunately, we have survived and become stronger inspite of the obstructions and efforts to kill our political will, and I have learned how to function in an atmosphere of complete

hostility. For some communities, this kind of prolonged experience would most assuredly kill any political will, and the new era of equality of representation envisioned by Congress in 1965 when it initially passed the Voting Rights Act to once and for all rid the country of overt discrimination in voting processes would be for naught. I urge you; I implore you to pass this very important amendment to the Voting Rights Act.

Mr. WASHINGTON. We will now turn to the members for their questions.

Mr. Canady.

Mr. CANADY. Thank you. I have just one brief question.

Would you believe me if I told you that I, as a member of this subcommittee, can not put an item on the agenda for this subcommittee?

Ms. GUTIERREZ. Would I be surprised; is that what you are asking me?

Mr. CANADY. Right, right.

Ms. GUTIERREZ. No, I would not be surprised.

Mr. CANADY. OK, thank you.

Ms. GUTIERREZ. Because of what I have had to endure, I am not surprised at all.

Mr. CANADY. So you think that would be an injustice to me as a member of the subcommittee, not to be able to put an item on the agenda for the subcommittee?

Ms. GUTIERREZ. Yes, I do.

Mr. CANADY. Thank you.

Mr. WASHINGTON. Ms. Gutierrez, let me ask you a few questions. Some of them may seem painfully obvious to you. Again, I will point out that perhaps 1,000 years from now, someone will read this record, and I want to make sure they clearly understand what I think I understand about what you are saying.

For Victoria County, we will just set the stage for those who are not familiar with the Texas political system. A county is governed by a governing county commission composed by five individuals; is that correct?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. One county judge and four county commissioners?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. And the county judge is elected countywide; is that correct?

Ms. GUTIERREZ. Correct

Mr. WASHINGTON. The full commissioners are elected from districts?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. Which are at least ostensibly or supposed to be equal in population?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. Are any of those individuals on the county commission at the present time of Hispanic origin?

Ms. GUTIERREZ. No.

Mr. WASHINGTON. They're not?

Ms. GUTIERREZ. Correct.

Mr. WASHINGTON. The Victoria Independent School District is an organ of government created under State law by the Texas Legislature; is that right?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. How many slots are there on the board of the Victoria Independent School District.

Ms. GUTIERREZ. Seven.

Mr. WASHINGTON. Seven?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. It has a geographical bounded area that is set out by metes and bounds, and it covers a certain amount of land or territory?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. Is that coextensive with the city of Victoria? Is the bound area of the school district the same as the city limits of Victoria, the city?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. So it is then a city school district?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. Victoria is a chartered city—again, chartered under the laws of the State of Texas?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. It has a mayor?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. And a city council?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. How many persons are eligible to be elected to the city council of the city of Victoria, TX?

Ms. GUTIERREZ. Three.

Mr. WASHINGTON. And then one mayor?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. So the city council, including the mayor of the city of Victoria, then, is comprised of four individuals; is that right?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. Are any of those individuals of Hispanic origin?

Ms. GUTIERREZ. One, just last year.

Mr. WASHINGTON. Are any of them of African-American ancestry?

Ms. GUTIERREZ. One, the year before.

Mr. WASHINGTON. Do those persons presently sit on that body?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. I neglected to ask, on the county commission of Victoria County, are there any African-Americans?

Ms. GUTIERREZ. No.

Mr. WASHINGTON. I believe that you said, until recently, you were the only member of the school board of Hispanic origin?

Ms. GUTIERREZ. Yes, until last year.

Mr. WASHINGTON. Are there any African-Americans on the school board?

Ms. GUTIERREZ. No.

Mr. WASHINGTON. I believe you indicated in your testimony, and correct me if I'm wrong, that 52 percent of the children who attend the Victoria Independent School District are of either Hispanic, African-American, Asian, or other minority ancestry?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. The purpose of the school district is to provide a free public education for those children; is it not?

Ms. GUTIERREZ. That is correct.

Mr. WASHINGTON. So have you found in your work that there is a measurable difference, in your opinion, between the quantitative and qualitative needs of some or all of the minority students as compared with the majority students?

Ms. GUTIERREZ. Yes, there is.

Mr. WASHINGTON. Would it be your opinion that a special knowledge of the needs and concerns of the minority community and the minority students would be helpful to school board member in performing for his students?

Ms. GUTIERREZ. Essential and crucial.

Mr. WASHINGTON. Have the members of the school board ever undertaken any kind of workshop or training session to sensitize those that may not be, by upbringing, education, or environment, already acutely aware of those needs?

Ms. GUTIERREZ. We have had numerous workshops.

Mr. WASHINGTON. It is your feeling that those who are of Anglo-Saxon origin are sensitive to the needs of the minority students?

Ms. GUTIERREZ. Absolutely not.

Mr. WASHINGTON. In your opinion?

Ms. GUTIERREZ. In my opinion, they are not. I say that because if they were sensitized to the needs of the minority community, my white counterparts would bring these issues forward on the agenda.

In the 8 years that I have served, not one Anglo counterpart that I have had has ever brought forth these issues. There are striking needs, if you would look at our academic performance.

If you would look into the minority schools that we have, it is very evident that there are great needs. In the 8 years that I have served, not one of my Anglo counterparts has brought forth these issues as a concern in terms of trying to effectively provide solutions to solving these important challenges before us.

Mr. WASHINGTON. Using the date of your election as the operative period of time to begin our inquiry, was the rule that required, in effect, the seconding by another school board member before an item would be available for consideration, adopted before or after your election?

Ms. GUTIERREZ. It was adopted after my election.

Mr. WASHINGTON. Had you been elected, qualified, and sworn to the school board at that time?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. So you were present when the discussion or the debate was had, relative to that change?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. Would you summarize, briefly, for the record, what reasons were given by the persons who were proposing this change, as to the necessity for it?

Ms. GUTIERREZ. That there was too much controversy on the school board. There was too much infighting. If you could not get two board members to discuss an issue, it did not merit discussion.

Mr. WASHINGTON. How many persons are required in order to request a record vote?

Ms. GUTIERREZ. Four.

Mr. WASHINGTON. So that means that you are saying that unless there is a majority of the members present who desire a record vote on something, one cannot even get these elected persons to be recorded so that the people and the world may know how they stand on a matter?

Ms. GUTIERREZ. No. In fact, I am glad you brought that up. When I voted, I was the lone vote on the closing of the minority schools and on many issues directly affecting the minority. I would say for the record, and I wanted to have the record reflect why I was voting no.

The superintendent, in concert with the president, decided that would not be part of the record. They said just to record my vote, and that I could not state for the record why I was dissenting. That was the sole decision of the board president and the superintendent of that school district.

Mr. WASHINGTON. Let me ask another question. Are you looked upon by others in your community and elsewhere as being a leader, whatever that means, in the community or in the Hispanic or in the minority community, in Victoria?

Ms. GUTIERREZ. Absolutely. I have been elected to the school board three times from my district. I would say that speaks for itself in terms of their viewing me as a leader. Otherwise, they would have not elected me three times if I were not.

Mr. WASHINGTON. So from time to time, the word" leader" of the minority community, or" leader" of the Hispanic community appears in association with your name, in either in print or video or audio recording?

Ms. GUTIERREZ. Absolutely correct.

Mr. WASHINGTON. So then as a leader in the minority community, or at least being observed and appreciated as such by people in the community, is it frustrating to you when orifices or devices such as this really negate or nullify any real power that you have on the school board?

Ms. GUTIERREZ. It is the most frustrating, most painful thing I have ever had to endure in my entire life.

Mr. WASHINGTON. It hurts, doesn't it?

Ms. GUTIERREZ. It is so painful to know that so many people depend on you.

Mr. WASHINGTON. Because, in effect, they have placed all their trust in you?

Ms. GUTIERREZ. They have placed all their trust in me.

Mr. WASHINGTON. And you know, as a matter of fact, that in the real world at the school board, the only thing that matters is whether you have four votes? I know this is painful, but I think it ought to be said out loud. That is why I am asking you. Unless you have four votes, you do not count down there; is that right?

Ms. GUTIERREZ. That is correct. They will tell you to your face," We do not care what the law says. We do not care what the policy says. We do not care what the regulation says. We do not care what the rules say. We have four votes to do whatever the hell we want to do." And they do it.

Mr. WASHINGTON. They tell you that, and then they go on and prove that to you.

Ms. GUTIERREZ. Yes. They not only tell me to my face, but they go and do it.

Mr. WASHINGTON. Let me ask a couple more questions along that vein, because I think this is important testimony for the record. I want to refer to it when this bill goes to the floor. It is better that it come from you than from me.

It hurts when you have to sit there, doesn't it, Ms. Gutierrez, and you have all these people that have placed their faith in you, and you and I know that you are just a figurehead, right?

Ms. GUTIERREZ. I am just a figurehead; just a pawn in their hands.

Mr. WASHINGTON. Then the community has expectations—for whatever reason, whether it is because of what they see happening in other parts of the country, or whether they pick it up from dialog and debate and discussions from the State legislature, or from whatever sources.

Then people get ideas in their minds, and they expect an organ of government to be able to respond to, in a meaningful way, those ideas and uplift them and make life better for them, and make the quality of schools better for them, and they get angry at you when their expectations go unrealized, don't they?

Ms. GUTIERREZ. Absolutely.

Mr. WASHINGTON. But at the same time, you have to counsel patience, don't you?

Ms. GUTIERREZ. Yes, and have the patience of Job.

Mr. WASHINGTON. Some people, especially younger people in the minority communities, are fond of calling people like you and I, Tio Tacos and Uncle Toms, right?

Ms. GUTIERREZ. Radicals, troublemakers.

Mr. WASHINGTON. On one side, you get called a radical and a troublemaker by many of the Anglos, and on the other side by the Hispanics and the African-Americans, you get called an Uncle Tom, or the Hispanic equivalent, which is Tio Taco, right?

Ms. GUTIERREZ. Yes. They tell me, why can't you get along?

Mr. WASHINGTON. Or, why can't you get things done?

Ms. GUTIERREZ. Yes. Why can't I get things done?

Mr. WASHINGTON. But at the same time, before you were elected to the board, if you had been white, all you needed to do was open your mouth and make a motion; is that right?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. After you were elected to the board, being white or Hispanic, you needed not only the ability to articulate well, and to think and understand and appreciate the needs of your community, but you needed someone who had the courage to second your motion?

Mr. GUTIERREZ. Yes.

Mr. WASHINGTON. I thank you for your testimony.

Ms. GUTIERREZ. Mr. Washington, may I add one more thing?

Mr. WASHINGTON. Sure.

Ms. GUTIERREZ. Last year, after I had served 7 years on the board, every May we organize the board. We have to elect our officers. After serving 8 years on the board, I wanted to be board president.

So I began seeking support to be board president. I went to my white counterparts and I asked them for their support. They very emphatically told me, "No." I had the most experience of all the board members, the most training—almost 400 hours of board training—10 times what any other board member had. I began to ask my white counterparts why I could not be board president.

I said, "Is it because I am not articulate enough?" "No, you are." I said, "Is it because I am not knowledgeable about 'Robert's Rules of Order?'" "Yes, you know them." "Is it because I don't know about issues and cannot speak to the issues of my constituency or the district?" "No, you know them."

I said, "Then, please tell me. Am I not experienced?" "Yes, you are experienced." I said, "If it is not training, if it is not experience, if it is not being able to articulate the issues and the concerns, why is it that you will not make me board president?"

They said, "Because you are controversial and emotional." Those are the two excuses they used for me; not all the things that I would expect then to negate to say, "No, we can't do this for you, Ms. Gutierrez." Those are the insipid reasons they used. That is disgusting.

Mr. WASHINGTON. The wheels of justice move slowly, but they grind fine, Ms. Gutierrez. Twenty, 30, or 40 years ago, we had other problems. It is unfortunate that we have to come to 1993 in this country, and it appears that we are fighting the same battles with a different face.

Ms. GUTIERREZ. In fact, that is what I told the editorial board when I met with them, because they were writing such horrible articles about me in the one newspaper we have. I said, "Why is this community fighting racial issues that were settled in other communities 30 years ago? Why are we fighting these issues?"

They said, "Well, it is worse somewhere else." I said, "I do not give a damn about somewhere else. I am concerned about our community and how we are addressing these issues. That is not a good reason for me."

I said, "Why are we going into the 21st century, and still having to address these issues?" To me, that is barbaric, to have to be addressing these issues, and we are going into the 21st century.

Mr. WASHINGTON. You get elected to that board, don't you?

Ms. GUTIERREZ. Yes.

Mr. WASHINGTON. How many years is your term? Is it a 2-year term or 4-year term?

Ms. GUTIERREZ. Three-year term.

Mr. WASHINGTON. When you stand for election, you are elected by the majority of the people who live in your district?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. Who vote in that election?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. That is what a democracy really is, isn't it?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. You don't have to be liked by the other people on the board.

Ms. GUTIERREZ. No.

Mr. WASHINGTON. You don't have to go along to get along, do you?

Ms. GUTIERREZ. No.

Mr. WASHINGTON. The people that elect you, I presume, have decided in the contest of the election that you are the person to best represent their interests, and you are their spokesperson on the board?

Ms. GUTIERREZ. Yes, sir.

Mr. WASHINGTON. Keep getting elected.

Ms. GUTIERREZ. Thank you, sir.

Mr. WASHINGTON. I do not have any questions for you, Ms. Cunningham. Do you have any additional statements you would like to make?

Ms. CUNNINGHAM. I just wanted to clarify something that I think may have left a wrong impression, that Mr. Cooper spoke about.

Mr. WASHINGTON. OK.

Ms. CUNNINGHAM. He said something to the effect that H.R. 174 would operate to freeze existing government structures, no matter how urgent the need for change.

Mr. WASHINGTON. Yes.

Ms. CUNNINGHAM. He talked about the preclearance process.

Mr. WASHINGTON. Right.

Ms. CUNNINGHAM. I think it is important to clarify two things. One, there is a 60-day automatic preclearance provision at the Justice Department, that once a jurisdiction submits a change, unless within 60 days the Department comes back with a specific objection, the change automatically may be implemented.

Mr. WASHINGTON. Right.

Ms. CUNNINGHAM. The other thing is that his analysis of how the retrogression standard would apply in the context of a *Rojas* and *Presley*-type bill, I think, is flawed.

I refer this committee to the case of *United States* v. *City of Richmond.* I do not have the citation, but I can get it. In that case, the question was whether an annexation of some area surrounding the city was——

Mr. WASHINGTON. Diluted.

Ms. CUNNINGHAM [continuing]. Diluted or had a retrogressive effect. The city presented evidence of good government policy for why it had made the change; and, in fact, the change had resulted in a lower percentage of minority population.

The court said that there is nothing inherently violative of section 5 in the city's decision to annex this less black territory. The question is whether, under the new system, there is a fair opportunity for minorities to participate. So I think that the parallel here is not whether H.R. 174 would completely hamstring local governments, but whether it would prevent local governments from making changes that were discriminatory.

As long as the local government comes up with a good government change that does not exclude particular members of the government body, or it does not create particular barriers to those members to participate equally with their white counterparts in the governing process, then there is no obstacle under the Voting Rights Act to implementing those changes.

Mr. WASHINGTON. Nor should there be.

Ms. CUNNINGHAM. Nor should there be, right.

Mr. WASHINGTON. Thank you very much.

On behalf of the chairman and all of the members of the committee, I would like to thank you all for the testimony that you have given.

I would just say that I think these hearings are more than an exercise that we undergo. Because, from time to time, members of

the subcommittee or the full committee or those who are not Members of the Congress, in the general public, will refer to the printed record.

So it is, I think, important to put things in context. Although it appears to some, from time to time, that I am being confrontational, it is not my intent or desire to do so.

I think that it is inappropriate to leave statements with which you disagree unchallenged in the record, for fear that someone will use them. If the record showed that you were present and you remained silent, then it at least creates an arguable presumption that you agreed with the statement.

The best analogy that I think one could use, trying to show people who don't understand on their own what it feels like would be to use Washington, DC. For example, if you had, all of a sudden, the city council passing a rule severely limiting or restricting the authority of certain members of the city council who represented, say, Northwest Washington, DC, and reposed most all of the power in either the at-large or the persons who represented Southeast Washington, DC, and Northeast Washington, DC, where it is generally known that most of the black people live.

There is no question that it would be easy to understand, by all of the community, that there was something foul afoot. What strikes me is that those of us who argue on behalf of black people would just as vigorously oppose that, because what is fair for one is fair for all.

The problem that I have is, so many people defend practices that are clearly wrong. They may not be within the legal niceties of a clear definition; and Congress, in 1965, could not have thought of all of the evil ways that people use to divide each other from God's creatures, and to discriminate against people.

However, I know that it hurts. I know, personally, that it hurts when you are elected to public office, and you have the responsibility of speaking on behalf of not only the Hispanic people, but all the people. This is because, you see, right thinking people who believe in the Constitution are not limited to people of color.

I happen to think that most Americans—black, white, Hispanic, Asian, or whatever we used to divide God's creatures—feel the same way. I happen to think that most people, even in the South, back in the 1960's or 1950's, when there were terrible atrocities being committed upon some of our citizens, knew better.

It is the job of the Congress to make the law real for people, and to make it such that with all the legal mumbo-jumbo and cases going to the Supreme Court on fine little technical points, the bottom line is that every citizen in this country feels that his or her vote has equal weight and equal respect; that they have the opportunity to elect people that they want to elect, whether the people look like them or not.

The Voting Rights Act was not designed, in my view, to allow black people to elect black people, or Hispanic people to elect Hispanic people. This is because I fundamentally know that if they are smart enough to sit on juries, which is where I think we repose most of our trust, they are smart enough to decide which candidate best represents their interests.

They do not always choose the one who happens to be of their same color. However, they understand the difference between the wheat and the chaff, and they make their decisions based upon that.

I view the role of the Congress as making sure that we do not change the rules, once we learn what the rules are, because it happens to be a black person or a Hispanic person who gets elected. When that happens, as long as I am in Congress, we are going to try to do something about it.

Ms. CUNNINGHAM. Can I say one more thing?

Mr. WASHINGTON. Sure.

Ms. CUNNINGHAM. I hate to keep bringing this back to the fine, technical points, as you called it.

Mr. WASHINGTON. I meant that in the best possible sense. I am trained as a lawyer who loves the law.

Ms. CUNNINGHAM. Representative Canady made a point. I actually wanted to know some more about what he was getting at when he said that he could not put an item on the agenda.

But I think it is also important to clarify that what we are talking about here is not just general frustration with procedural inconvenience.

Mr. WASHINGTON. Right.

Ms. CUNNINGHAM. The question is, can Representative Canady, as the only minority member of a body, however minority is defined, and upon his arrival on that body—or perhaps not necessarily immediately upon his arrival—but the sense is, is there some relative lack of authority and inability of some members of the body, in comparison with the entire body, to participate equally?

I think procedural problems are procedural problems. Nobody likes a procedural obstacle; but the question is one of fairness.

Mr. WASHINGTON. Sure. I would not be overly concerned with his comment. I assume that it was either in jest or otherwise not deserving of a response, quite frankly. This is because every Member of the Congress has the same right.

As a matter of fact, it was taken out of context, because neither do I have the right to put items on the agenda. That refers to the rights and responsibilities of the Chair as opposed to members of the subcommittee. It has nothing to do with him being of the minority persuasion.

In terms of the politics of the committee, being a Republican has nothing to do with his inability to put items on the agenda. I am a Democrat, and I don't have the right to put items on the agenda.

I am afraid, and appropriately so, the only thing that limits the rights of people around here is intelligence. That is the way it ought to be.

Let me move on to the other panel. This is the chairman's statement that I am reading now, March 18, 1993.

"We are very lucky to have Mr. James Blacksher with us today. Mr. Blacksher represented the African-American plaintiff in *Presley* v. *Etowah County Commission.*

"He has been litigating voting rights and civil rights cases in Alabama for nearly 20 years. In 1982, Mr. Blacksher received the Outstanding Civil Rights Performance Award from the 'American Lawyer' magazine.

"Mr. Blacksher, we look forward to hearing your firsthand testimony on the voting discrimination issue. I would also like to invite Mr. Bowers and Mr. Gray to come to the table at this time.

"Mr. Blacksher, we are happy to have you, and we welcome your testimony. Your entire statement, without objection, will be made a part of the record, as well."

STATEMENT OF JAMES U. BLACKSHER, ESQ., VOTING RIGHTS LAWYERS FROM ALABAMA

Mr. BLACKSHER. Thank you, Mr. Washington.

I also attached to my written statement the written statement of Emmitt Jimmar, who is the sole black county commissioner in Colbert County, AL. I ask that it be admitted in the record, as well.

Mr. WASHINGTON. It may be done, without objection.

Mr. BLACKSHER. I am going to just try to pick out a few points to emphasize. I will try to focus on what I think are the most important policy issues in a matter like this.

The first point I want to make, and it has been made several times by the earlier speakers, is to first keep in mind that the issues before the Congress in bill 174 are still part of the same process of equal rights and political empowerment that was begun decades ago, over a century ago, actually.

We are still operating in the United States under the legacy of Anglo and white supremacy, and in all the institutional ways that that became a part of the fabric of our public life. One of the central tenants of the whole ethic and policy of white supremacy in the American South was the proposition that blacks should not be in a position of authority in public affairs; and certainly not in a position of authority over the affairs of white people or their property.

That attitude is still central to the way we all think. I am a white Southerner. I speak for myself as well as for the other people in my community. I think it is silly for us to contest the fact that we still have those attitudes, or even fears.

If you look back, the Federal involvement in the voting rights issues first began when the 15th amendment first became seriously considered for enforcement purposes. I cite that in my statement, a passage from *Terry* v. *Adams,* which was a 1951 Supreme Court case, before voting rights legislation ever came through the Congress.

In that, Justice Hugo Black, our former Senator, made the remark that the whole purpose of the 15th amendment was to provide and ensure that previously oppressed people, and in this case, African-Americans, had a genuine opportunity to participate in the process of democratic self-government. He referred, in particular, to the day-to-day operations or the day-to-day governance of counties in Texas.

From the beginning, in other words, we have understood in this country that voting rights means participation in democratic self-government. It has no other purpose. It makes sense in no other

context. This is because in those days, we were just trying to get blacks registered to vote, or admitted to the white primary—the Democratic white primary.

The Voting Rights Act of 1965, of course, focused on the various devices that kept blacks from registering. Then we moved to the second generation, encountering at-large election systems, gerrymandered single member districts, and a variety of other practices that were aimed at preventing enfranchised African-Americans and Latinos from being able to exercise their electoral influence in an effective way.

At that time, the Voting Rights Act came under attack when it was used to try to confront at-large elections and other practices. The same arguments that we hear today were made back then.

At-large elections, it was said, do not have anything to do with voting. They said, it will be absolutely horrible. It will debilitate State government. They will be constantly having to stop what they are supposed to be doing and deal with Federal bureaucracies trying to get their prior approval to go forth with anything as simple as, in those days, the specter of changing the polling place. The date a polling place changed had to be precleared.

Thousands and thousands of these minor, ministerial-type changes have to be precleared, primarily by local governments. Some State attorney general's offices get involved, to some extent. But these are all bureaucratic procedures, if you will, that we have gotten used to.

We have just gone through, in Alabama, the redistricting of something like 200 local jurisdictions that adopted single-member districts for the first time, around 1987 or 1988, and when the 1990 census came out.

Can you imagine all the of the preclearance submissions that accompanied the various changes, not only in the districts, but in every one of those little cities or counties, or particularly, in the small towns as small as 200 or 250 people, who discover when they submit their new districts that they also have to go back and submit their polling place changes, their precinct line changes, the areas that have been annexed to the town since the Voting Rights Act was enacted.

Yet, most of these places or many of them deal with it, even without the assistance of lawyers. I mean, we know the people in the Department of Justice who operate, if you will, the Alabama desk.

County clerks pick up the phone and call, and say," What do I do?" They tell them what to do, and they do it. Most of these things are cleared routinely.

But the present controversy is over the fact that, as in Alabama, as Mr. Gray's statement says," we have more black-elected officials than any other State in the union." In absolute numbers, over 700 black-elected officials are in office. Now, the project of trying to get African-Americans an equal share in the process of democratic self-government shifts to the legislative chamber.

That is where, again, questions are being raised about what the meaning of voting is; but it is still the same meaning. We are not talking about, as Dayna Cunningham said, outcomes. We are talking about whether or not the African-American community or the

Latino community is asked for its consent in the process of democratic government; or, is it required to operate by rules and procedures and allocations of authority that are the sole possession of the same white majority, and are forced to play the role of outsiders, with no influence whatsoever as a matter of structural or institutional devices?

Now, that is a systematic problem that frustrates the whole notion that we have a democratic government. It frustrates the very notions of justice in the United States. I say something in my written statement, and spend quite a bit of time pointing out that most of the original debate surrounding the adoption of the Constitution of 1787 in the United States of America was devoted to this question of how do you keep majorities from abusing their power.

That is really all that the Voting Rights Act addresses. It is there as a checkpoint; not to prevent majorities from exercising their majority rule, not to prevent governments from governing, not to interfere with the legitimate democratic process. It is there to make sure that those who are without legal power or political power at this time are not the victims of an abuse of that major power.

The other point that I want to make is—and if I made several points under the category of one, I apologize—the question of House bill 174 and the amendment, or what I would call the *Presley* amendment to the Voting Rights Act. This is not just a matter of whether there are going to be new changes that have to be submitted to the Department of Justice, and they will be handled and so forth.

The central importance to those of us who work in day-to-day politics in the State, and Mr. Jerome Gray can discuss this, perhaps better than I, and the impact of the Voting Rights Act is that it is like a beacon for those of us out there in the provinces, if you will, describing what constitutes justice in this country.

Right now, there is a message out there that it is fair for white majorities to exercise unlimited control and dominate all the processes of democratic government, because the Supreme Court has said so. The Supreme Court said so, based on what the Supreme Court thought the Congress of the United States was saying in the Voting Rights Act.

If the Congress of the United States remains silent, as you pointed out earlier, Mr. Washington, the Congress of the United States will be heard in this country as saying," It is fair, if you are in the minority. If you cannot stand the heat of the kitchen, get out of it, et cetera."

But that is fairness, in the United States. It is not a question of what the legalities are, and whether there is a problem of Federal interference and excess Federal intrusion in State and local affairs, or whether there are too many burdens on State and local governments in having to comply with bureaucratic regulations.

The problem is that, as the law now stands, there is a message abroad that it is fair to abuse majority rule. Once the law is amended to make it clear and just to clarify that Congress meant what it said at the beginning, that the Voting Rights Act is intended to be as broad as necessary to provide political justice to African-Americans, Latinos, when that amendment is passed, it will transform the way we do business on a day-to-day basis.

At that point, a lot of the problems you were hearing Ms. Gutierrez talk about in the way she is treated by the white majority on her school board, simply will not be possible.

This is because that white majority will know that what they are doing is against the law. They will not have to take Ms. Gutierrez's word for it. The Congress will have told them that it is against the law, and they cannot, on a day-to-day basis, disrespect her and her constituents.

That will change the atmosphere, if you will, the public ethic in the way we operate in the South—and we do know how to operate fairly in politics, if you tell us what the rules are.

However, if you tell us the rules and say it is OK for us to use the sledgehammer of absolute majority rule, we are going to use it, because that is fair.

Thank you.

Mr. WASHINGTON. Thank you, Mr. Blacksher.

[The prepared statement of Mr. Blacksher follows:]

PREPARED STATEMENT OF OF JAMES U. BLACKSHER, VOTING RIGHTS LAWYERS FROM ALABAMA

Thank you for allowing me to testify in favor of passage of the Voting Rights Extension Act of 1993. I am a (white) private attorney from Alabama who has been actively engaged in voting rights litigation since 1975. I have participated in cases that resulted in court orders striking down racially discriminatory at-large elections in over 200 jurisdictions in Alabama and Florida and increased black representation on many existing single-member district bodies, including the Alabama Legislature.

A. RECURRING JUDICIAL ATTEMPTS TO LIMIT THE EFFECTIVENESS OF THE VOTING RIGHTS ACT

This is like deja vu all over again, and I can't really say I'm happy to be here. My colleague Ed Still and I represented black voters in *Presley* v. *Etowah County,* 112 S.Ct. 820 (1992),[1] where for the first time the Supreme Court limited the scope of Section 5 of the Voting Rights Act. We were also counsel for plaintiffs in *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980), when the Supreme Court restricted the reach of Section 2 of the Voting Rights Act. I testified before this subcommittee on June 24, 1981,[2] in support of the bill that became the Voting Rights Amendments of 1982.[3] With amended Section 2's results test, Congress corrected the voting rights enforcement problems created by *City of Mobile* v. *Bolden.* Now, if progress toward the fundamental objective of the Voting Rights Act, equal political participation of blacks and language minorities, is to continue, Congress must act again.

There is sad irony in the *Presley* decision. The Supreme Court, which led this country's post-World War II movement toward equal rights and equal political participation for black Americans, now has positioned itself as an obstacle to realization of that goal. The Court did not have to pick this fight. The question in *Presley* was one of statutory interpretation; it did not present new constitutional issues. Congress had defined the term "voting" as broadly as possible to include "all action necessary to make a vote effective," 42 U.S.C. 1973*l*(c), and my clients had convinced the Bush Administration that these particular changes in the institutional powers of elected officials have the potential to abridge the voting rights of protected minorities. Congress designed Section 5 of the Voting Rights Act to be enforced without any judicial intervention; the Attorney General's preclearance decisions are reviewable only by the District Court for the District of Columbia. The limited role of the Alabama federal court in the *Presley* case was simply to order Etowah County

[1] I wish to pay homage to our client, the representative plaintiff, Commissioner Lawrence C." Coach" *Presley*, who died unexpectedly earlier this year. Coach *Presley* was a vigorous champion of equal rights, and I wish he were here today to speak for himself and for the African-American citizens of Etowah County he did his best to represent.

[2] Hearings on Extension of the Voting Rights Act Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, 97th Cong., 1st Sess., Serial No. 24, Part 3, p. 2036 (1982).

[3] 96 Stat. 131, 42 U.S.C. § 1973 *et seq.*

to comply with Section 5's requirement of review by the federal executive department, not to decide whether or not the disputed changes were discriminatory.[4] Congress delegated to the Attorney General authority to work out the particulars of Section 5 enforcement, including identification of the kinds of practices that implicate voting. Federal courts have recognized the great deference they must give the Attorney General's determinations about particular facts.[5] So, after persuading the legislative and executive branches of the United States government that their democratic rights were threatened, Etowah County's black citizens have had their path to freedom blocked by a judicial branch that was, as we say in Alabama, just meddling.

The *Presley* decision jeopardizes the future viability of what may be the most successful civil rights provision ever enacted, Section 5 of the Voting Rights Act. In important respects, Section 5 has been self-implementing; it was designed by Congress to be enforced with little or no judicial involvement. Until now, Section 5 had inspired a new ethic of fairness for historically oppressed minorities that influenced most state and local political processes. In contrast with the patterns of evasion that prevailed two decades ago, today most Southern politicians know they cannot legally enforce changes that affect the electoral strength of African-American voters without first obtaining preclearance under the Voting Rights Act. The Department of Justice has streamlined its procedures sufficiently to screen tens of thousands of Section 5 submissions each year. But, more importantly, I can testify from personal experience that Section 5 has effectively forestalled countless plans to dilute black voting strength by discouraging their authors from even attempting such changes and by encouraging them instead to design new procedures that will not provoke Section 5 challenges.

Now, however, in the wake of *Presley*, an open invitation has been extended to those who would minimize blacks' voting power by fencing out their representatives from effective governmental participation. By placing new limits on Section 5, the Supreme Court has sent a message to majority white governments that here at last is a way legally to block the march of African-Americans toward genuine political equality. Simply put, that message is this: So long as you perpetuate the regime of white supremacy in the name of white majoritarianism, the Government of the United State will not interfere. Coming from the Supreme Court, that message ties the hands of the executive branch and will promote oppression in the name of Congress as well—unless Congress acts promptly and decisively to reaffirm its original intention that the Voting Rights Act be construed as broadly as necessary to open fully state and local political process to previously excluded racial and ethnic minorities.

B. NEW USES OF WHITE MAJORITARIANISM TO PRESERVE OLD PATTERNS OF WHITE SUPREMACY

White majoritarianism was the principal justification for the popularity of at-large election schemes in the post-World War II South: the same white majority could choose all the members of governing bodies; black minorities could elect no candidates of their choice. At-large elections were the principal target of second generation voting rights battles. After first generation legal actions had removed most of the barriers that had effectively disfranchised the entire black community for seventy years, fairly drawn single-member districts enabled African-Americans to elect their own representatives to state and local governments. Now third generation legal initiatives are challenging structural barriers to black representatives' ability to exercise equal influence in the governing process.

One must keep in mind that all three generations of voting rights enforcement, at one level or another, have been trying to break down a central tenet of the historical regime of white supremacy: the doctrine that no black person—nor even a white person beholding to black voters—should ever exercise genuine authority over public affairs, and especially not the affairs of white people. Thus, third generation voting rights problems are not concerned simply with how often black representatives win or lose votes on the council, commission or board, but with decisional rules and restructured executive powers that deny officials representing black constituencies the chance ever to influence government policy and practice. These structural changes, while race-neutral on their face, actually institutionalize the tradition that the white majority will always vote as a solid bloc to defeat the political initiatives of the black community.

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[4] *E.g., Presley* v. *Etowah County Commission*, 112 S.Ct. 820, 833 n.4, 838 n.22 (1992) (J. Stevens dissenting).

[5] *Presley, supra*, 112 S.Ct. at 831, citing *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178-79 (1985); *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131 (1978).

C. EXAMPLES OF PERVASIVE PRESLEY PROBLEMS IN ALABAMA

The post-Voting Rights Act changes in Etowah County and Russell County, Alabama, that safeguarded white monopolies over road and bridge operations are only symptomatic of the much broader white majoritarian project of keeping the hands of black voters off the levers of genuine governmental authority. This is a chronic problem we encounter in jurisdictions that only recently began electing candidates favored by black voters.

For example, the Escambia County, Alabama, Commission was also in the original *Presley* suit. Its sole black representative (appropriately named William America), shortly after he was elected, discovered that the prior informal practice of deferring to each county commissioner's hiring decisions had been modified, allegedly due to new fiscal restraints and the need for "good government" reforms. We ended up dismissing the Escambia County aspect of *Presley* before trial, after certain concessions were made to Mr. America's power over a share of the county budget.

At the other end of the state, in Colbert County, the single African-American on a six-member county commission has encountered a whole bevy of changes that threw up roadblocks to his participation in governmental power. The written statement of Colbert County Commissioner Emmitt Jimmar is attached to my statement, and I ask that it be made a part of the record in these hearings. It summarizes ways in which the white commission majority continues prior practices of deferring to the representatives of affected districts, except in the case of the black representative. Mr. Jimmar has encountered a "stone wall" of 5–1 votes and even more refusals to second his motions. The informal rules were changed to deny the black representative a veto over adding emergency items to the meeting agenda, and the white chairman threatened to cut off services to Mr. Jimmar's constituents if he continued to criticize the white commissioners private meetings.

In Barbour County (George Wallace's home county in the Eastern Black Belt), only one black commissioner, Ross Dunn, was elected in the first single-member district election in 1988. He experienced the same problems as Emmitt Jimmar in Colbert County: secret meetings of the white commissioners and motions by the sole black representative dying for lack of a second. Thanks to the addition of a second black commissioner, due to redistricting, and the institution of standing committees, the representatives of the majority black Barbour County districts have improved ability to influence governmental decisions.

In Alabama municipalities, one of the powers of city councils is to appoint the members of city school boards (by contrast, county boards of education are popularly elected). When a court-ordered change from at-large elections to single-member districts enabled African-American voters in Talladega to elect two of the five city council members, the white majority on the council voted as a bloc to perpetuate the custom of limiting black representation on the Talladega City Board of Education to only one of five. Repeated demands for additional representation from the black community were repudiated. Finally, black citizens brought suit when the school board decided to abandon its traditional practice of promoting the assistant superintendent to superintendent, just when Dr. T.Y. Lawrence was in line to become the first black superintendent ever. Indeed, consistent with the central tenet of white supremacy, never in history has there been a black superintendent of a majority white city or county school board in Alabama. The lawsuit, *Lawrence and Patterson* v. *City of Talladega,* CA No. 91-C-1340-M (N.D. Ala., June 26, 1992), resulted in a consent decree[6] requiring, for the first time in Alabama, that a municipal school board be popularly elected. Using the same single-member districts as those employed in city council elections, African-American citizens of Talladega in February 1993 elected two members of the board of education, one of whom was Dr. Lawrence. This immediately provoked another third generation vote dilution scheme. In a move aimed squarely at Dr. Lawrence, who is a longtime member of the appointed city water board, the white city council majority adopted a rule change that prohibits any person from serving on more than one city "board."

Another change in road and bridge practices took place last year in rural Butler County, Alabama, during the pendency of a federal lawsuit that was about to increase black representation on the five-member county commission from one to two and eliminate the at-large elected county executive officer. Butler County's population is 40% black. Where before each commissioner had limited autonomy in his road district, with a road crew, equipment and some contracting authority, on the

[6] I should point out that this settlement was facilitated by the assignment of this case to the sole African-American member of the federal bench in Birmingham, Hon. U.W. Clemon. For us in the white community, another vestige of white supremacy is our fear and loathing at the prospect of having black people sit in judgment of our affairs.

eve of increased African-American representation the outgoing commission adopted a unit system, delegating all road and bridge executive authority to the appointed county engineer. The able attorney for Butler County correctly advised his clients that the Supreme Court's *Presley* ruling left them free to implement this change without first submitting it for preclearance under Section 5 of the Voting Rights Act. We were able to conclude the lawsuit with a negotiated settlement,[7] which leaves the unit system in place but modifies decisional rules to provide the black community some protection from a white majoritarian monopoly. *Myles* v. *Butler County,* CA No. 92-T-243-N (M.D. Ala.) (final approval pending). The consent decree requires that, during the decade-long term of the decree, all county commission actions adopting or modifying the county budget must obtain four votes—a "supermajority." On these crucial matters, the white commissioners will not be able to use their simple majority systematically to count out black community interests.

In the board of education aspect of the Butler County case, however, the 3-2 white majority agreed to use a four-vote supermajority to elect the board president, but refused to extend supermajority voting to selection of the superintendent and top school administrators. The white school board president said he was ideologically opposed to "artificial" constraints on simple majority rules. But the lawyer for the board told an assembly of black citizens quite frankly that he feared massive white flight from the public schools in Butler County if white school patrons knew that the superintendent had to be acceptable to the black community as well as to whites. Because the single-member district system was too young to have developed a track record, my clients agreed to a consent decree that leaves open for the next decade the possibility that Judge Thompson may order extension of the supermajority procedures if the wishes of black representatives are systematically submerged by the white majority.

In *Dillard* v. *Calhoun County Commission,* 831 F.2d 246 (11th Cir. 1987), Judge Thompson was affirmed by the Eleventh Circuit Court of Appeals when he found that at-large election of the county commission chairman diluted black voting strength and ordered that the position be rotated among the commissioners elected from single-member districts. Subsequently, a rotating chair has been included in most of the consent decrees we negotiated with county commissions, school boards and city councils in the statewide *Dillard* case.

Supermajority voting rules have been used elsewhere in Alabama to require representatives of the white and black communities to pursue consensus—or near consensus—on important issues. Perhaps the best example is in the state law creating the new city council for the City of Mobile. As you know, after the 1980 Supreme Court reversal, on remand the district court accepted plaintiffs' proof of historical intent and reissued its order striking down at-large election of the three Mobile City Commissioners. *Bolden* v. *City of Mobile,* 542 F.Supp. 1050 (S.D. Ala. 1982). *See also* S.Rep. 94-417, 97th Cong., 2d sess., pp. 26-27 (1982). A broad consensus developed among Mobilians that a mayor-council system would be preferable to the existing commission system, if single-member districts were required to afford black citizens representation. Thanks to the age-old anti-majoritarian informal rule of "local courtesy" in the Alabama Legislature, the local legislative delegation for Mobile County had a free hand to write the new mayor-council statute for the City of Mobile. Thanks to court-ordered reapportionment of the Alabama Legislature, four of the twelve members of the Mobile County delegation were African-Americans, and thanks to another anti-majoritarian legislative custom, the local law had to be adopted by consensus. The local black legislative caucus, led by my former law partner,[8] Senator Michael Figures, negotiated terms in the Mobile City Council statute that to this day require that important business be adopted by five votes on the seven-member council.[9] Since three of the seven districts have black voting majorities, the government of Mobile, a city with 200,000 residents, has operated just fine under semi-consensus principles.

Russell County, the other county before the Supreme Court in the *Presley* case, now has the same 4-3 white majority on its county commission that Mobile has on its city council. But, emboldened by the Supreme Court's narrow reading of the Voting Rights Act, the white majority on the Russell County Commission has rejected our proposals to ameliorate the oppressive effects of its road and bridge unit system by adopting supermajority voting procedures. We are still negotiating, however, this time over another structural change that could help break the hammerlock of white

[7] As in the *Lawrence* v. *City of Talladega* case, this settlement was facilitated by the prospect of trial before the other African-American federal judge in Alabama, Hon. Myron Thompson, who sits in Montgomery.

[8] We discontinued our partnership in 1979, before these events occurred.

[9] Ala. Code 11-44C-28 (1989).

majoritarianism and promote consensus government. Jerome Gray, State Field Director for the Alabama Democratic Conference, who is testifying with me here today, has asked Russell County to consider adopting a standing committee system, along the lines of one he successfully negotiated with the Shelby County Commission, which has only one black member out of nine. Under Jerome's scheme, the commission would divide itself up into several standing committees, e.g., a road and bridge committee, a personnel committee, a finance committee, etc. Each commissioner would serve on at least two committees, would have a chance to chair one committee, and in some cases (not in Shelby) would serve on a majority black committee. Even though standing committees can only make recommendations to the whole commission, internal rules of deference would give the African-American minority representatives a realistic chance to break patterns of white bloc voting and to exert effective influence on the governing process.

The use of potentially powerful standing committees as a protection for minority interests is a familiar device to the Congress of the United States. It can work in some local governments as well. In fact, consensus government is an old tradition among (all-white) Southern county commissions. Studies show that county commissioners everywhere try to work out their differences informally before public meetings, so they can vote unanimously on agenda items. Voting against your fellow commissioners often is considered a breach of etiquette.[10]

I do not wish to leave the impression that black representatives are shut out of effective governmental influence everywhere in Alabama. For example, in the urban counties, Jefferson (Birmingham), Madison (Huntsville), Montgomery and Mobile, the black county commissioners either exercise important executive functions, sit on powerful standing committees or operate under assorted formal or informal decisional rules that encourage consensus. As a result, there is a much more collegial (if not always harmonious) atmosphere among white and black elected officials, none of whom can afford to disregard the other without taking unacceptable political risks. Similarly, in suburban Baldwin and Shelby Counties, standing committee structures have empowered the single African-American representative to engage in effective coalition politics. These counties provide examples of how things could be done differently in Etowah, Russell, Colbert, etc. to enable officials elected by majority-black constituencies to provide equal and effective representation.

D. THE NEED FOR PASSAGE OF H.R. 174

Section 2 of H.R. 174 would go far toward relieving the crippling effects of the *Presley* Court's narrow reading of the Voting Rights Act. By specifying that "the term 'procedure with respect to voting' includes any change of procedural rules, voting practices, or transfers of decision making authority that affect the powers of an elected official or position," the bill reaffirms that the Act's provisions should be construed as broadly as necessary to guarantee equal political participation for protected minorities.[11] Without such an amendment, the Voting Rights Act will cease to be the most effective legal instrument of progressive change we have ever seen for historically oppressed African-Americans, Latinos and Native Americans.

E. RESPONDING TO OPPOSITION ARGUMENTS

In my opinion the arguments that were advanced in opposition to last year's version of H.R. 174 pervert both the purpose of the Voting Rights Act and founding principles of American democracy. They can only be understood as expressions of alarm that the Act really is changing the status quo by helping Americans of color to advance toward genuine political equality.

(1) Voting and Governance

The opponents praise the *Presley* majority's conclusion that Congress, when it defined voting broadly to include "all action necessary to make a vote effective," 42 U.S.C. § 1973*l*(c), could not have intended that the equal opportunity to vote include the equal opportunity to participate in governance.[12] First of all, this stands voting rights principles on their head. The fundamental purpose of the right to vote is to

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[10] *E.g.*, Vincent L. Marando and Robert D. Thomas, *The Forgotten Governments: County Commissioners as Policy Makers* 99-101 (Gainsville, FL: The University Presses of Florida, 1977).

[11] I also support § 3 of the bill, which assures that reasonable expert expenses will be recoverable in voting rights cases, as they are in other civil rights actions. Given the standards of proof for establishing entitlement to judicial relief for voting practices that impermissibly minimize the electoral power of protected minorities, *e.g.*, *Growe* v. *Emison*, 61 U.S.L.W. 4163, 4168 (Feb. 23, 1993), expert testimony is indispensable in virtually every voting rights case.

[12] H. Rep. No. 102-656, p. 16 (1992).

provide citizens the opportunity to participate in representative government. Voting is "a fundamental political right, because preservative of all rights."[13] Impairing the ability of African-Americans to participate in "the elective process that determines who shall rule and govern in the county . . . is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens."[14]

The opponents trivialize the right to vote when they contend that the "internal decision making processes" of state and local governments can have nothing to do with voting.[15] Isn't it obvious that this proposition, like any other, has critical limits? To use some extreme hypothetical examples, would the opponents insist that no Voting Rights Act issue was presented if the white majority on the Etowah County Commission had adopted a resolution dividing all executive duties among themselves and totally excluding the person elected from the majority black district? Or designating representatives of the majority white districts road commissioners and the representative of the majority black district dog catcher? Or specifying that the vote of the black commissioner be counted at half the weight of the others? At some point, the majority's marginalization of the black commissioner takes away the ability of voters in the majority black district to elect their representative on the governing body on an equal basis with all other voters. As the Assistant Solicitor General pointed out during the *Presley* argument, we used to associate the popular election of mere tokens, officials who will exercise no real governmental power, with totalitarian regimes.

(2) The Right To Vote: Consent To Self-Government, Not a Demand for Equal Outcomes

Perhaps opponents of the *Presley* amendment would renew their argument that in such extreme situations the white majority could be sued for intentional racial discrimination under 42 U.S.C. 1983.[16] But this point is true of many voting claims (in fact, that's how we finally won the *Bolden* case), and it does not change the fact that the injury suffered by black citizens concerns their voting rights. To use another extreme hypothetical, if the white commissioners took away the black commissioner's road duties because he simply refused to repair his constituents' roads, they would not be guilty of intentional discrimination, but the move would just as much affect black citizens' voting rights.

The historical discrimination Congress sought to remedy with the Voting Rights Act is the systematic exclusion of black Americans from democratic self-government. This discrimination involves much more than denying black citizens their fair share of government services; its primary injury is the denial of human dignity and freedom that only comes with full-fledged citizenship. As John Adams said during the American Revolution, "There are but two sorts of men in the world, freemen and slaves." He went on to explain that "[t]he very definition of a freeman, is one who is bound by no law to which he has not consented."[17] I often tell judges in my voting rights cases that our main complaint is not that Southern white folks don't govern fairly (frequently we do, contrary to popular belief), but that black folks aren't allowed to govern at all.

African-Americans, Latinos and other minorities protected by the Voting Rights Act do not demand an equal opportunity to influence the outcomes of governmental decisions, as opponents of the *Presley* amendment charge; rather, what they demand is an equal opportunity to participate in the process of self-government promised by the American democratic tradition of a representative republic. It is not equal outcomes blacks, Latinos and Native Americans seek, but their consent to the governmental processes which decide those outcomes. The founding principle of representative democracy in the United States is the consent of the governed, not the power

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[13] *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964), *quoting Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1986).

[14] *Terry* v. *Adams*, 345 U.S. 461, 470 (1953).

[15] H. Rep. No. 102-656, p. 16 (1992).

[16] H. Rep. No. 102-656, p. 16.

[17] Joyce Apple by, *Liberalism and Republicanism in the Historical Imagination* 158 (Cambridge, MA: Harvard Univ. Press, 1992), *quoting Tracts of the American Revolution: 1763-1776*, ed. Merrill Jensen (Indianapolis, 1967), 315-16.

of a legislative majority. When white majorities, acting in the very particular context of this country's legacy of slavery and anglo supremacy, consistently vote systematically to deny representatives of minority communities the same powers of office enjoyed by representatives of white citizens, the processes of democratic government are corrupted in an oppressive way that Americans of color have never consented to and never will consent to.

(3) The Latest Floodgates Arguments: The Role of the Attorney General

But, the opponents have said, where will all this lead? Won't every legislative decision of state and local governments be reviewable under § 5 of the Voting Rights Act? Adoption of budgets? The appointment of coffee committees? "Floodgates" arguments like these have confronted every stage of Voting Rights Act development; as before, common sense and experience show they are groundless. With respect to circumstances like those in *Presley*, governmental actions implicate voting only if they affect in some systematic, structural, institutional way the power or influence minority representatives can hope to exert over ordinary decisions.

The key here, as always, is the Attorney General's continued adjustment of section 5 regulations and enforcement procedures as new circumstances require. From the Act's beginning, Congress has understood that, once it undertakes the project of guaranteeing political justice for disadvantaged racial and ethnic minorities, there will be no simple formulas that can corral fundamental unfairness in political processes. So Congress wisely commissioned the Attorney General to confront the emerging varieties of particular situations and to work out procedures that advance, but do not overreach, the Act's remedial purposes.

That is precisely what the Attorney General did in the *Presley* case. The last amendment of the section 5 regulations explicitly left open for further factual development the extent to which reallocations of official authority require Voting Rights Act preclearance.[18] When confronted with the particular facts from Etowah and Russell Counties, the Attorney General issued a determination that the changes in question, because they made crucial structural changes in the powers of elected officials, clearly affected voting. He explained his reasoning to the local governments and asked them to submit the changes for preclearance. When the county governments refused to comply, the Attorney General carefully laid out the rationale for voting rights enforcement to the federal judiciary. In refusing to give their usual deference to the Attorney General's application of Voting Rights Act principles to particular facts, the white majority of the three-judge Alabama court and the Supreme Court frustrated the enforcement scheme Congress had established.

(4) American Democracy: Majority Rule But Not Majority Oppression

After hearing all the arguments about governance and interference with local government and workability, it is clear that the real basis of the opponents' objection to the proposed amendment of the Voting Rights Act is an ideologically rigid defense of majority rule, even if it means perpetuating white supremacy. According to this narrow ideology, any interference with the ability of legislative majorities always to outvote minorities "misconstrue[s] the nature of legislative power in a representative democracy."[19] Absolute majority rule must be safeguarded even in "deplorable" situations where "black or hispanic candidates, once elected to office, might be relatively powerless to shape legislative decision making because they are consistently outvoted by antagonistic white majorities."[20]

But it is the opponents of the *Presley* amendment, not its proponents, who misconstrue the founding principles of American democracy. We too believe in majority rule, but not in an absolutist fashion, and never when it is abused, not just occasionally to defeat, but systematically to oppress racial and ethnic minorities.

The spirit of the Great Compromise that made possible the Constitution of 1787 was constraint of majority rule to avoid oppression of minorities. Thus the legislative branch of the Government of the United States has one house apportioned by population and another equally divided among the states, and all the branches of

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[18] Office of the Attorney General, Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965; Final Rule, 28 CFR Part 51, 52 Fed. Reg., No. 3, p. 488 (Jan. 6, 1987).

> While we agree that some reallocations of authority are covered by Section 5 (e.g., implementation of "home rule"), we do not believe that a sufficiently clear principle has yet emerged distinguishing covered from noncovered reallocations to enable us to expand our list of illustrative examples in a helpful way.

[19] H. Rep. No. 102-656, p. 17.

[20] *Id.*, pp. 17-18.

government operate within a complex system of checks and balances designed specifically to restrain the whims and passions of simple majorities. The morality of balancing majority and minority interests was exhaustively discussed in the constitutional debates.

James Madison wrote the often cited Federalist Paper No. 10 to explain how and why the Constitution's scheme was designed "to break and control the violence of faction."[21] He used the term faction in its broadest sense.

> By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.[22]

Madison thought that minority factions would eventually be controlled by the power of the people, and he explained why the drafters' central concern was majority factions:

> When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. . . .[23]

He distinguished the American "republic, by which I mean a government in which the scheme of representation takes place," from "a pure democracy" by the "advantage which a republic has over a democracy, in controlling the effects of faction."[24] The federal system, a bicameral Congress, checks and balances between a variety of government departments, and many other features of the Constitution were designed specifically to prevent majorities and minorities from oppressing each other.

Again, in Federalist No. 51, Madison reiterated this central point. "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."[25] Using the most forceful possible language, Madison explained why curbing the abuses of majority rule is a fundamental principle of American democracy:

> Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature. . . .[26]

Consequently, one searches in vain for any constitutional endorsement of the principle of strict majority rule. Instead, the Constitution of the United States guarantees that each state shall have "a republican form of government."[27] Where the Constitution does prescribe legislative rules of decision, it is never an unqualified simple majority. For example, although the President must be elected by majority vote, it is by a majority of electors, who are apportioned among the states based on their combined numbers of senators and representatives.[28] If the House of Representatives must choose the President, it is by a majority vote in which each state has only one vote.[29] Most decisional rules specified by the Constitution require

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[21] The Federalist No. 10, *reprinted in* Garry Willis (ed.), *The Federalist Papers by Alexander Hamilton, James Madison and John Jay* 42 (New York: Bantam Books, 1988). Because he was an architect of the "Virginia Plan" on which the Constitution is based, and because he personally instructed the first President and the first Chief Justice on the grand scheme of the Constitution, "[n]o man's ideas had more effect on our republic." Garry Willis, Introduction to *The Federalist Papers, supra*, at xi.

[22] Willis, *supra*, 43 (emphasis added).

[23] *Id.* at 45 (emphasis added).

[24] *Id.* at 46, 48.

[25] Federalist No. 51, Willis, *supra*, at 264.

[26] *Id.* at 265.

[27] U.S. Const. Art. IV, § 4.

[28] *Id.*, Art. II, § 1; Amend. XII. In his famous essay, *Common Sense*, Thomas Paine had gone much farther in the anti-majoritarian direction, proposing that the Presidency be rotated among the colonies.

[29] *Id.*, Amend. XII.

supermajorities; either a two-thirds majority[30] or a three-fourths majority.[31] Not even a constitutional amendment can deprive a nonconsenting state of its "equal suffrage in the Senate."[32]

Of course, in ordinary circumstances we would expect governmental bodies to operate through simple majorities. It is only in matters of fundamental importance, which implicate the organic consent of various segments of the people to representative government, and in circumstances where it is necessary to safeguard minorities from majoritarian abuses, that supermajorities and other forms of consensus or near-consensus decision making must be employed.

From Madison and Tocqueville[33] to Bickel,[34] Dahl[35] and Levinson,[36] the literature on American democracy reveals our "[t]raditional concern with protecting minority rights in the face of majority rule. . . ."[37] Neither simple majority rules, supermajority rules, plurality rules nor any other kind of decisional rules or governmental structures are absolute; none always assures justice and always advances democratic government in every circumstance. We should recall that John C. Calhoun invoked the anti-majoritarian device of concurrent majorities for the purpose of defending the states' right to maintain slavery;[38] Lincoln defended the Union in the name of (a qualified) majority rule;[39] Karl Marx cited majority rule to justify communism.[40] In the first half of this century, Southern congressmen and senators used the many anti-majoritarian decisional rules available in Congress, such as seniority, standing committee assignments and the filibuster, to defend the numerous majoritarian devices employed back home to subordinate black people through segregation and white supremacy.[41] The white Democratic primary and runoff elections were invented in the South to secure the white majoritys exclusive power. Meanwhile, once all-white rule was assured, local governments frequently adopted districting systems, county road shop schemes, informal consensus decisional rules, and other anti-majoritarian decisional devices to guarantee the autonomy of different minority groups within the white community.

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[30] *Id.*, Art. I, §3 (Senate vote of impeachment); Art. I, §5 (vote of either houses to expel a member); Art I, §7 (override of Presidential veto); Art. II, §2 (Senate vote to ratify treaties); Art. V (vote of both houses to propose constitutional amendment); Amend. XIV, §3 (vote of each house to remove civil disabilities of U.S. officials who engage in insurrection).

[31] Art. V (number of state legislatures needed to ratify constitutional amendment).

[32] *Id.*, Art V.

[33] Tocqueville, Alexis de. *Democracy in America,* Trans. Henry Reeve, Ed. Henry Steele Commager (London: Oxford University Press, 1971), Chap XIV.

[34] Alexander M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975).

[35] *E.g.,* Robert A. Dahl, *Democracy and Its Critics* (New Haven and London: Yale University Press, 1989), Chap 18. Dahl, of course, is much better known for his unmasking of majority rule as actually rule by powerful, elite minorities.

[36] Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988).

> Majority rule is simply not the same thing as constitutionalism, as that concept was classically defined. One cannot understand the notion of a constitution, at least prior to twentieth-century thought, without including its role of placing limits on the ability of majorities (or other rulers) to do whatever they wish in regard to minorities who lose out in political struggles.

Id. at 70.

[37] Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 Va. L. Rev. 1413, 1477-78 and nn.227-230 (1991) (citing some of these authorities).

[38] *See generally,* Ross M. Lence (ed.), *Union and Liberty: The Political Philosophy of John C. Calhoun* (Indianapolis: Liberty Classics, 1992).

[39] First Inaugural Address of President Abraham Lincoln, March 4, 1861, *reprinted in* Carl Sandburg, *Abraham Lincoln: The War Years,* Vol. I, p. 132 (New York: Harcourt, Brace & Co., 1939).

> Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

[40] "All previous historical movements were movements of minorities, or in the interest of minorities. The proletarian movement is the self-conscious, independent movement of the immense majority, in the interest of the immense majority." Karl Marx and Friedreich Engels, *The Communist Manifesto,* Chap. 1.

[41] *E.g.,* Robert A. Dahl, *Democracy and Its Critics, supra,* at 260.

Indeed, protection of the minority against oppressive majorities is a hallowed tradition of white-only Southern culture.[42] The Alabama Constitution of 1901, in addition to provisions designed to disfranchise black citizens,[43] contains a variety of restraints on the power of simple legislative majorities to trample (white) minority interests.[44] In addition, most Alabama taxes are earmarked, so state and local legislative majorities must spend the revenues in designated ways, and by established custom, passage of local laws is subject to the unfettered discretion of local legislative delegations, so long as there is unanimous consent by delegation members.

Segregation eventually was defeated by the majoritarian efforts of an activist national government constitutionally legitimated by the New Deal[45] and by a post-World War II Supreme Court who condemned racial oppression in the name of liberal, Individualistic rights. Voting rights law grew out of the one-person, one-vote cases, and now its majoritarian tilt toward headcount democracy is being turned against the political empowerment of oppressed minorities by neo-white supremacists in the courts[46] and by the opponents of the pending amendment of the Voting Rights Act. Now that African-Americans, Latinos and Native Americans are being elected to federal, state and local governing bodies in increasing numbers, voting rights progress must shift away from the centralizing tendencies of the bureaucratic state and its judicially supervised civil rights agenda[47] and rediscover the even older American traditions of republican autonomy that enable minority groups to share real political influence. If we are to avoid the corruption of majoritarianism that produces the kinds of ethnic turf wars now erupting all over the world, and that is fueling "white flight" to balkanized suburbs now surrounding Birmingham and most other cities in this country, we must reinvigorate for a modern, multiethnic America our founding ethic of minority empowerment, even if that ethic of political justice originally was designed to guard against factional oppression only within a society of free English Americans.[48]

The Madisonian vision, which balances both concepts of majority rule and minority empowerment, is the view handed down to us by the Federalist Constitution. The question is never simply whether majority or plurality or consensus rule is better, but whether in particular contexts one facilitates oppression and the other justice. This is the approach of the Voting Rights Act: it seeks not to prescribe or regulate the particular forms of state and local governments, but to ensure that whatever democratic forms may be used do not oppress racial and ethnic minorities by

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[42] Suspicion of majorities is deeply rooted in American culture generally. Some familiar quotations about the definition of a majority are:

"The will of a rabble." John C. Calhoun
"One with the law is a majority." Calvin Coolidge
"One man with courage makes a majority." Andrew Jackson
"One of God's side is a majority." Wendell Phillips
"Any man more right than his neighbor." Henry David Thoreau
"All the fools in town." Mark Twain.

But see: "The forgotten American, the man who pays his taxes, prays, behaves himself, stays out of trouble and works for his government." Barry Goldwater.

[43] *E.g.*, *Hunter* v. *Underwood*, 471 U.S. 222 (1985).

[44] *E.g.*, 1901 Ala. Const. §§ 44, 63 (bicameral legislature and concurrent majorities), § 125 (gubernatorial veto and pocket veto), § 116 and Amend. 282 (term limits for governor), § 200 (senate districts may not divide counties), § 284 (requiring 3/5 vote of both houses plus a majority of voters to amend constitution).

[45] *See* Bruce Ackerman, *We the People: Foundations* (Cambridge, MA, Harvard Univ. Press, 1991).

[46] *E.g.*, *Smith* v. *Brunswick County Bd. of Sup'vrs*, — F.2d (4th Cir., Feb. 1, 1993) (reversing a district court judgment striking down a redistricting plan under which an all-white county commission was elected in a majority black Virginia County; the court of appeals ruled that black citizens have no voting rights claim if they have headcount majorities in some districts, even though 98% of whites vote solidly against black candidates).

[47] I am convinced that Judge Frank Johnson was defending his good government reasons for favoring the county unit system over the old district patronage system when he wrote the majority opinion for the three-judge court in *Presley*. The sole African-American member of the three-judge court, Myron Thompson, dissented on the ground that the suppression of black electoral influence, which is the primary if not the sole concern of the Voting Rights Act, outweighed the claimed fairness and efficiency of unitized road and bridge operations.

[48] "In the second number of *The Federalist Papers*, for example, John Jay declared his satisfaction that Providence has been pleased to give this one connected country, to one united people; a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs. Providence had acted with convenient and characteristic discrimination. Dislodged native Americans and displaced Africans were obviously excluded from this united community of white, Anglo-Saxon Protestants." Michael Levin, *The Spectre of Democracy* 158 (New York: New York University Press, 1992) (footnote omitted).

denying or abridging their right to vote. In this context, even majoritarian procedures, like county road and bridge unit systems, common road funds, and rules of decision that require only simple majorities, must operate with racial fairness or give way to practices that more nearly provide genuine voting equality.

Mr. WASHINGTON. I am reading again from the chairman's prepared remarks.

"Mr. Michael Bowers worked as a staff counsel in the attorney general's office of the State of Georgia until he took over the office in 1981 through his appointment as attorney general. Attorney General Bowers has been reelected to that position three times since then.

"We thank him for joining us today. Mr. Bowers, welcome to the subcommittee."

STATEMENT OF MICHAEL J. BOWERS, ATTORNEY GENERAL, STATE OF GEORGIA

Mr. BOWERS. Thank you, sir. It is a great honor for me to be here.

Mr. WASHINGTON. Thank you.

Mr. BOWERS. I have attempted to make three points in my written comments. Those comments having been made a part of the record, I would like to focus on one, which is just a matter of practicality.

In your questions earlier of Mr. Cooper, I agree with you. I do not have any trouble with rebuttable presumptions. But if people are being treated the way that Ms. Gutierrez described, there is absolutely no excuse or reason, and there is nothing that can be said in favor of that.

However, I speak in opposition to H.R. 174, and principally, for the reason I would like to discuss with you. If this committee deems it necessary to proceed with a bill of that nature, I ask you to please try to use some reason on this basis.

I sincerely believe it would be an enormous intrusion into the operation of State and local government. My office, in a typical year, submits about 45 or so voting rights acts matters to the U.S. Justice Department. If the current language in H.R. 174 is adopted, I believe that that is going to skyrocket up into the 700 range.

I brought with me, just as an illustration, these two volumes of Georgia law. These are all the laws passed by our legislature, these two volumes, in 1992. There are 973 statutes.

I had my staff go through them, using what we believe would be the standard. I cannot tell you that we would be perfect in this, or that we would do exactly what the Justice Department would do.

However, somewhere in the neighborhood of 75 percent of these laws would have to be submitted. This is because, as I think all of us would well understand, government in this country is involved with apportioning power among different folks at different times, depending on their different needs or perceived needs.

These laws, 75 percent of them, we believe, would involve just that sort of thing, to include such matters as a budget. Now, that is because that involves changing power. It involves affecting the allocation of authority and power among various elected officials.

If you cut my budget, and I am an elected official, you are going to affect my ability to deal with the statutory duties that I am assigned.

This would hold true also, not just for State government, but for city and county government. I would say to you, in the best sincerity of which I am capable, that would be an enormous intrusion.

Furthermore, if this were to be construed as I believe it would be, it could very well, and I think most likely would, require submissions of such things as advice that my office would render; from the legislators to members of other executive departments to the local governments.

It would require submission of city and county attorneys advisory opinions, because they always affect power. Can I do something? Am I prevented from doing something? Who has power to do something?

The same holds true with respect to court opinions. Many, many of the decisions of the Georgia courts involving elected judges involve questions about the power of a sheriff, a voting registrar, a probate judge, or what have you, and all of those, at least potentially, I would submit, under this language, would require submission.

I am not asking in any way that any ability of any citizen or public official who has been wronged in the way that I have heard described today, that the ability to fix that be cut back, or that that be blocked in any way.

I am just humbly asking you, as an elected public official in a covered jurisdiction, don't make us come up here for virtually everything that we do in trying to engage in the very difficult experiment of self-government. I think that is self-defeating. It would not be the sort of thing that would encourage respect for government.

After the 236 members of the Georgia General Assembly would enact one of these statutes, that might only have the most minor effect on my authority; for example, giving the greater authority to prosecute, to then have that before its effectiveness, be approved by someone here in Washington in the Justice Department, who is not elected, I think, is most demeaning for self-government. I just ask you, if you are going to do this—and that is your business, not mine—do it some other way than requiring section 5 submissions.

When I was a staff lawyer, I did section 5 submissions, and they are a big thing. There is a lot of workload.

That is not the point. The point is that is it requiring all these governments—and we have over 700 governments in Georgia of some kind or another—that every time they do the least little thing with respect to a sheriff, probate judge, city council or whatever, we've got to come to Washington and get it approved, regardless of how benign it may be. I just respectfully ask you not to do that.

Therefore, as it is currently drafted, I respectfully submit to you that you ought not to approve H.R. 174.

Thank you.

Mr. WASHINGTON. Thank you.

[The prepared statement of Mr. Bowers follows:]

PREPARED STATEMENT OF MICHAEL J. BOWERS, ATTORNEY GENERAL, STATE OF GEORGIA

Mr. Chairman, and members of the Subcommittee:

I appreciate the opportunity to speak to you today on H.R. 174, which proposes amendments to the Voting Rights Act of 1965. My remarks will be addressed solely to Sec. 2 of the bill, which is intended to reverse the decision in Presley v. Etowah County Commission, ___ U.S. ___, 117 L.Ed.2d. 51 (1992). In my opinion, if H.R. 174 is adopted, it will interfere significantly with the ability of state and local officials to fulfill the duties placed upon them by the people who elected them to office. I would like to make three brief points with regard to this legislation: (1) the bill is of questionable constitutionality; (2) the bill represents an extreme intrusion into state and local governmental affairs; and (3) the bill would require an incredible increase in the administrative workload of state and local governments.

H.R. 174 IS OF QUESTIONABLE CONSTITUTIONALITY

As you know, the Voting Rights Act of 1965 was intended to enforce the Fifteenth Amendment to the United States Constitution, which provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." (Emphasis supplied). Section 5 of the Voting Rights Act requires covered jurisdictions such as Georgia to obtain "preclearance" of any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c.

States must obtain this "preclearance" in one of two ways: either by filing an action in the United States District Court for the District of Columbia seeking a declaratory judgment that the statute or other provision has neither the purpose nor effect of discrimination; or, by choosing what was originally intended to be the more "expeditious" route of submitting each provision to the Department of Justice for a similar ruling. Although the Supreme Court recognized that this requirement of preclearance was an "uncommon exercise of congressional power," it was nevertheless upheld as within the grant of power to Congress in the Fifteenth Amendment. South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966).

The first major problem with H.R. 174 is that it would drastically expand the scope of Section 5 of the Voting Rights Act by requiring Georgia and other covered jurisdictions to preclear "any change of procedural rules, voting practices, or transfers of decision-making authority that affect the powers of an elected official or position." (Emphasis supplied). This language goes even beyond the broad construction given to Section 5 in Allen v. State Board of Elections, 393 U.S. 544, 556, where the Court stated that "Congress intended to reach any state enactment which altered the election law over covered State even in a minor way." (Emphasis supplied).

If adopted, the language in H.R. 174 would do far more than merely "alter[] the election law" of covered jurisdictions. I agree with the United States Supreme Court in Presley, supra, that this language would reach even the internal operations of state legislatures or local school boards which wish to do nothing more than modify their subcommittee assignment system. (117 L.Ed.2d at 64-65). Equally as disturbing are the conclusions of the Presley Court that the position of the United States as amicus in that case, now reflected by the language contained in the H.R. 174, that "every time a covered jurisdiction passed a budget that differed from the previous year's budget it would be required to obtain preclearance" (Id., at 65); that "every time a state legislature acts to diminish or increase the power of local officials, preclearance

would be required" (Id.,); and that "changes in the routine organization and function of government" would be covered (Id., at 64); as would the creation, alteration, elimination of a whole host of appointive posts. (Id. at 65) (emphasis supplied).

As the Presley Court emphasized, such "[c]hanges which affect only the distribution of power among officials are not subject to §5 because such changes have no direct relation to, or impact on, voting." (Slip Opinion at 14; emphasis supplied.) This fact will not change regardless of whether H.R. 174 is passed. Congress can amend the Voting Rights Act, but it cannot amend the Fifteenth Amendment to the Constitution. Since the Fifteenth Amendment only pertains to the "right of the citizens of the United States to vote," I respectfully would submit that if H.R. 174 in its present breadth is adopted, it will ultimately be struck down as unconstitutional because it encompasses matters "not comprehended by the Fifteenth Amendment." South Carolina v. Katzenbach, supra, at 326.

H.R. 174 REPRESENTS AN EXTREME INTRUSION INTO THE AFFAIRS OF STATE GOVERNMENT

Virtually all acts of the Georgia General Assembly and ordinances of the various county and city commissions, councils and other governing bodies implicate changes of decision-making authority that affect the "powers of an elected official or position." If H.R. 174 is passed, this means that those acts, which form the very essence of self government, will be subject to the prior approval under Section 5 of the Voting Rights Act. I do not believe that either the Fifteenth Amendment or the Voting Rights Act itself was ever intended to go so far. These two volumes I have before me on the table contain all laws passed during the 1992 session of the Georgia General Assembly. There were 973 statutes passed during that session and of those laws, 725, or 74.5 percent, would arguably fit within the broad language of H.R. 174, and have to be precleared. H.R. 174 would thus be an enormous intrusion into the government of the State of Georgia by its people.

Nor would the reach of H.R. 174 be limited to the statutes included in volumes such as these. For example, prior to the Presley decision, the United States Department of Justice notified members of my staff the Department had learned that a county in the metro Atlanta area, DeKalb County, had deeded real property which comprised DeKalb Junior College to the

State Board of Regents for operation as a state institution. The Justice Department took the position that since this was a "change" which diminished the authority of the elected governing body in DeKalb County, it should have been submitted for preclearance under Section 5 of the Voting Rights Act. However, because this was a mere transfer of property from one unit of government to the other, we notified the Justice Department that a Section 5 submission was not appropriate. Only after the Presley decision did the Justice Department abandon its position that the transfer required preclearance.

This situation presents a typical scenario which will occur if H.R. 174 is enacted. The intent of the Voting Rights Act is to ensure that the right to vote is not denied or abridged on account of race, not to require federal review of any state or local action whereby a government body enters into some contract affecting its authority or which somehow implicates the powers of an elected position.

Since H.R. 174 also would cover "procedural rules," its reach might well to encompass the host of rules and regulations that are promulgated by the various executive branch departments, agencies and commissions. The subject matter of these regulations can range from the duties of the county Departments of Family and Children Services insofar as they might diminish the authority of the county governing body, to increasing the duties of the state-level professional licensing

boards, under the supervision of an elected official, the Secretary of State. All such non-emergency regulations are currently promulgated by the Georgia Secretary of State's office pursuant to our Administrative Procedure Act, which provides for notice and public hearings before they become effective. If, in addition, these rules and regulations have to be precleared by the Justice Department, you can readily see that state government will simply become too unwieldy to work on anything other than any emergency basis.

Finally, I am concerned that H.R. 174 would also cover legal advice issued by my office as Opinions of the Attorney General. As in many other states, I am authorized, as the chief legal officer for the state, to render legal opinions when so requested by the Governor and other department heads, legislators, judges, etc. Many times these requests will describe a certain practice now in effect and ask me to give my official opinion as to its legality. I will then have to say, for example, "no, that practice is not proper -- the law requires that you change to another practice." Now would that opinion be one which should be precleared under Section 5? Arguably so. Other requests will ask me to interpret ambiguous statutes, rules, etc., and I will have to issue an opinion which says, for example, "under the statute being examined, certain authority has been delegated to one local official and not another." Again, must this opinion be precleared? And if

it must, what about all the court rulings and opinions that address the very same issues? If all these opinions must be precleared, then I would respectfully submit that H.R. 174 would effectively destroy our system of federalism.

H.R. 174 WOULD RESULT IN AN INCREDIBLE INCREASE IN THE ADMINISTRATIVE WORKLOAD OF STATE AND LOCAL GOVERNMENTS

For the past five years, the members of my staff have submitted an average of approximately 43 state statutes per year to the Justice Department for Section 5 preclearance. In addition, for 1992, the only year for which we have records, there were at least 306 submissions from local jurisdictions, 269 made by county attorneys, and 37 by city attorneys. Conservatively, I would estimate 15 to 20 hours of personnel time involved in getting out an average submission. This would include (1) the Secretary of State's office screening legislation to send to us, (2) their providing to us two copies of the enrolled bills, (3) review of the bills and assigning them to particular attorneys (and the paper work involved with that), (4) the attorney reviewing and comparing the new and old legislation, (5) the attorney preparing the draft of the submission (which may require getting maps, statistical data, reviewing prior submissions and obtaining the

names of local minority contracts), (6) the secretary typing the admission, (7) the attorney reviewing the typed draft and making corrections, (8) review of the draft and making corrections, (9) the secretary doing the corrections and printing it, (10) putting the submission physically together along with the exhibits, (11) having the Attorney General review and sign the submission, (12) copying it and mailing it out.

Making this conservative estimate of 20 hours of work per submission, this means that personnel in my office have spent approximately 860 hours per year for the past five years making submissions to the Justice Department. Applying the same hours estimate to the submissions from the local jurisdictions would mean that they required approximately 6,720 hours to complete. This estimated time, of course, does not take into account the additional time required to handle the numerous questions, correspondence, telephone conversations, etc. which occur between our office and the Justice Department.

Nor does the estimate set out above include the decennial requirement that all redistricting legislation be submitted for preclearance. In 1990, one of the senior attorneys in my office spent approximately 481 hours, or approximately 85% of his time over a three-month period, working on, and submitting, redistricting plans for the State House of Representatives, State Senate, and the United States Congressional districts.

Other attorneys assisting him probably put in an additional 50 hours.

If, instead of an average of 43 acts per year that we have been submitting, our office also had to participate in submitting the 725 acts from these 2 volumes of the 1992 Georgia Laws, which would be covered by H.R. 174, you can see that the workload of not only my staff, but that of the county and city attorneys throughout the state, would be increased exponentially.

An added complication of the requirement to preclear state statutes is the time involved in waiting for the Justice Department to tell us whether they plan to object to our legislation. Although the Voting Rights Act and the federal regulations now indicate that, unless the Justice Department objects to a State's submission within 60 days, it will stand approved, 42 U.S.C. § 1973c; 28 C.F.R. § 51.9, this does not tell the whole story. In practice, what happens more often than not is that, prior to the expiration of the 60 days (and sometimes by fax on the 60th day), our office will be informed that the Justice Department requires additional information relative to a particular submission. Such requests are authorized by 28 C.F.R. § 51.37, but the problem is that they effectively toll the requirement that the Justice Department object within 60 days or have the submission be deemed approved. According to the regulations, the 60-day response

time for the Justice Department does not start running again until the state completes sending in the requested information. 45 C.F.R. § 51.37. By this device, the Justice Department can extend its response for four (4) months or longer.

Additionally, we are required to submit for preclearance the holding of special elections. Under O.C.G.A. § 21-2-540, we are required to have at least 29 days notice between the call and holding of a special primary or general election. Routinely in these circumstances, there is no preclearance back from the Justice Department prior to the holding of the special election, which should be held as soon as possible so that the public representative's office does not go vacant for too long.

What this delay means in practical effect, is that if, for example, the Georgia General Assembly passes a budget which is signed into law on April 15, as was the FY '93 Appropriations Act contained on pages 1701-1785 of this volume before me, members of my staff would have to forward this budget to the Justice Department for preclearance, and it could not be enforced for at least 60 or 120 days thereafter, and possibly much much longer, as explained a few minutes ago. This could mean that state and local governments might have to function for a quarter of their fiscal year without any funds. Without the appropriations authorized in the budget act, state and

local governments would effectively come to a halt. Neither the Voting Rights Act, nor the Fifteenth Amendment itself, was intended to have such an effect. This would be tantamount to destroying the concept of federalism as we know it today.

If this were to happen, then the warning by Mr. Justice Black in South Carolina v. Katzenbach would finally have come true:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. And if one law concerning voting can make the States plead for this approval by a distant federal court or the United States Attorney General, other laws on different subjects can force the States to seek the advance approval not only of the Attorney General but of the President himself or any other chosen members of his staff. It is inconceivable to me that such a radical degradation of state power was intended in any of the provisions of our Constitution or its Amendments.

383 U.S. at 359-360.

Therefore, I urge the members of the committee not to adopt the language of H.R. 174. Thank you.

Mr. BOWERS. Sir, may I add one more point?

Mr. WASHINGTON. Yes, sir, go ahead.

Mr. BOWERS. I have an airplane at 2:15. As soon as it is convenient for you, can I be dismissed?

Mr. WASHINGTON. Yes. Unless other members come back, I plan on us all being gone long before then, General.

Thank you very much for your testimony.

Mr. BOWERS. Certainly.

Mr. WASHINGTON. I am reading, again, from the chairman's statement.

"Mr. Jerome Gray is the State field director for the Alabama Democratic Conference. He is our final witness today.

"Through his 14-year tenure at the African-American Political Caucus, Mr. Gray has exposed the reality of the minority political representation in Alabama on a daily basis.

"He also coauthored a chapter on Alabama in the forthcoming 'National Study on the Impact of the 1965 Voting Rights Act,' funded by the National Science Foundation.

"Mr. Gray, we welcome you, and we look forward to hearing your testimony. As I have indicated to previous witnesses, your written statement will be made a part of the record, without objection. You may summarize or speak, however you wish."

STATEMENT OF JEROME A. GRAY, STATE FIELD DIRECTOR, ALABAMA DEMOCRATIC CONFERENCE

Mr. GRAY. Thank you, Mr. Washington.

I want to thank you for giving me an opportunity to appear before this committee today to speak in favor of the need for Congress to pass the Voting Right Extension Act of 1993.

I am the State field director of the Alabama Democratic Conference, which is statewide grassroots black political organization that has about 64 county units or affiliates in 67 of the Alabama counties.

In trying to come at why we need this extension, based upon the experiences and comments that I hear from hundreds of black-elected officials around the State, now that we have been successful in getting over 700 blacks elected, primarily as a result of the Voting Rights Act, and particularly, the extension of 1982, I thought of a baseball story that I heard at a political meeting shortly after I began working for ADC back in 1977.

The setting of the story was in the early 1940's during World War II in a segregated Southern city. In this city, in order for black boys to watch the ball game, they would go to the park. They could not go inside. Several black boys who had some ingenuity found a knothole in the center field wall of the stadium.

There they began to try to watch the ball game going on inside, stooping and squinting to try to see what was going on. From this vantage point, all they could see was an occasional center fielder, a pitcher, a second baseman, the batter, the catcher, and the umpire.

By these boys being able to see even this small part of the field and the game, they were excited and thrilled. As the game advanced, inning by inning, and a batter finally hit a home run over the center field fence, one of the boys at the knothole caught the

ball. During those segregated days, if a black boy caught the ball, he was allowed to bring the ball back into the park by the stadium managers.

Well, when the young lad brought the home run ball back into the ballpark, he was astonished by what he saw. For the first time, he had an opportunity to see all of the bases, all the players, the infield, the outfield, the bullpen, the dugouts, and the scoreboard. In other words, being inside the park, his awareness of the playing field suddenly grew.

Pretty much with the passage of the 1965 Voting Rights Act, the awareness of many black citizens in Alabama and throughout the South was akin to the experience those young boys had, watching that baseball game through the knothole in the 1940's. But when Congress passed the Voting Rights Act, it made it possible for black citizens to enter the ballpark of politics, and made it possible for us to begin to play the game, with either black-elected or appointed officials.

Now that that became possible, some teams began to change the rules of play and fair competition. They developed these new policies, practices or procedures restricting the ability of black-elected officials to participate fully in all aspects of the political game. I just want to give you some examples of some of those restrictions.

In Huntsville, AL, shortly after Dr. James Dawson, a member of the Alabama A&M University faculty, was elected to the city school board, he asked the superintendent to provide him with a copy of the résumés of the individuals that she was recommending to the board for jobs in the system.

She refused to provide Dr. Dawson with the information he requested. Of course, the school board's attorney told him that he was not privy to the information also.

Dr. Dawson protested that decision. He held a press conference, letting the community know of his frustration. He threatened to file a lawsuit. Still, the school board superintendent did not change her position.

Dawson called me and asked, "Jerome, what can I do?" Of course, we've got the Alabama sunshine law. We requested the attorney general's opinion. The attorney general of the State of Alabama wrote a very good opinion, in effect, saying that as a member of the school board, Dr. Dawson was entitled to review the job applications.

The superintendent of the board still refused to allow him to review the job applications. This was in direct opposition to a stated school board policy, which said that all members of the school board were entitled to review any and all information that they deem necessary to determine whether they wanted to vote for or against the superintendent's recommendation in considering personnel matters.

Well, Dr. Dawson did go to court. His lawyer subpoenaed all present and former school board members. In fact, he told me there were probably about a dozen people who were subpoenaed—all white board members, present or past. Under oath, they all admitted that the superintendent had never denied them any request they had made to review job applications.

By the way, Dr. Dawson is back in court now, protesting the payment of attorney fees, because his position is, he sued the school board over its own policy and won. The school board now refuses to pay his attorney fees, but the school board superintendent lost the case, and the school board has agreed to pay her attorney fees.

In 1975 in the city of Montgomery, when they adopted a mayor-council form of government with a nine member council, four blacks were elected. They were jubilant and the paper called it, the surprise of 1975.

However, after the four elected blacks on the council got there and began to survey the lay of the land and were concerned about getting appointments made to various municipal boards, they discovered there were some municipal boards that they could not get any appointments to.

When they began to inquire as to why they could not get appointments on some municipal boards, they discovered there was an unwritten rule that preference would be given to those majority-white districts where those board appointments had been made, before the blacks got on the board.

When they sought to get the city to change the practice of allowing only those council districts to make board appointments, they could not get the cooperation of the majority-white council and the mayor.

This issue has been in the news for several years. The Montgomery Advertiser and the Advertiser Journal have written editorials condemning the practice. There is a biracial group in Montgomery, which has sent the mayor and council a resolution asking them to abandon that practice, but the council has been reluctant to do so.

In talking with a black council member, Leu Hammonds, before I came here, he told me that he thought they had worked out a compromise to get more equity in board appointments. However, he said that there still was resistance on the part of some of the council members to appoint blacks to the water board and to the airport authority board.

The final example I want to cite involves the county commission in Washington County. At the beginning of 1991, we began to negotiate with the Washington County Commission, which did not have a black serving on that body, and the county was almost 25 percent black. We were able to negotiate and get them to go to a five district plan, with one majority black district.

The interesting thing that developed there was, they had what we often called the old shed or road camp system. The four white commissioners were concerned about how they would finance "the fifth district," the minority district.

What they did not want to do, even though the county was not growing in size, was to share resources with the person who was going to be elected in the new majority-black district. So they wrangled over who would give the newly elected black commissioner some of their used or hand-me-down equipment, without the input and participation of the black commissioner.

Well, here are some things that happened to the black commissioner, once he entered that political ballpark down in Washington County.

They did give him an equal share, and they decided that each commissioner would get about $241,000. On the face of it, I guess, it sounds fair.

Here's the catch. When Willie Dixon, the newly elected black commissioner took office, he had to start from scratch and buy everything to operate his district: a new truck, a new grader. He could not afford to buy an important piece of equipment, he said, which was a front-end loader, because it would take him 3 years to save up enough money to do that.

So he then requested his fellow commissioners to allow him to use one of their front-end loaders. Two commissioners, he said, had three of them. In a council meeting, when a vote was taken to transfer one of the front-end loaders from their district to his, he said, the vote was, two, two, and one abstention. So Willie Dixon did not get that grader.

He asked me to be sure to mention that he did not get any of the money which the district commissioners brought forward from the previous fiscal year. They had a fund which they had from the previous year's budget, but he was not able to share in that.

In 1981, when this committee met in Montgomery and held a field hearing to receive testimony regarding the extension of the Voting Rights Act that year, Congressmen Don Edwards, Henry Hyde, and the late Harold Washington were the members of that field committee that received testimony from witnesses in the South, regarding the importance of extending and amending the 1965 Voting Rights Act.

In my opinion, that was a great day for us for many reasons. First, Washington came to Alabama. Second, you listened well, as you are doing here today. Third, you heard the cries of injustice and denial of voting rights. Fourth, you responded promptly and positively by giving our Nation and our State a stronger amended version of the Voting Rights Act in 1982.

Because of this subcommittee's work that year that you did so well, in my opinion, more than a decade ago, you are responsible for black people having the opportunity to play ball in many political ballparks throughout Alabama today.

In 1981, when this subcommittee came to Montgomery, there were only 247 black-elected officials. In 1993, our State has more than 700 black-elected officials. We are proud of the fact that our State, even though we are last in a whole lot of categories, we are first in the number of black-elected officials, primarily because of what this committee did, and what Congress did thereafter in amending the act.

I even did a little summary report to show how great the gains have been in Alabama. We have a black voting age population of 22.7 percent.

If you were to just look at certain categories of offices, and how closely the blacks have been successful in organizing to be elected to positions, of the county commissioners, statewide, blacks represent 22.79 percent of all commissioners. We are 22.32 percent of all county school board members.

We are 20.59 percent of city council members. We are 17.14 percent of the legislators. Blacks represent 16.36 percent of all elected officials in the State.

In closing, I am reminded of a question that Congressman Hyde raised in a wonderful op-ed piece which he did back in 1981 that was published in the Sunday, July 26, issue of the Washington Post that year. The piece was titled, "Why I Changed My Mind on the Voting Rights Act."

Hyde admitted that he came to Alabama with serious reservations about supporting the act, because he said that he held the conviction that 17 years was long enough to keep these jurisdictions in what he called the political penalty box.

Moreover, it was Hyde's view that the Federal courts, and not an administrative arm of government, should be the proper vehicle for citizens' redress, if Voting Rights Act abuses continued.

Fortunately, as he said, once he heard the Alabama hearings and what the witnesses had to say, he realized that what ought not to be, compared to what often is the true state of affairs, in many of these local jurisdictions, as we heard from Ms. Gutierrez today, that that testimony from those witnesses changed his mind and made him a supporter of extending the 1965 Voting Rights Act.

In fact, he said that his concern for Federal intrusion into the affairs of state faded when compared to the importance of people having access to the political process. Therefore, this question: "What good is all the political rhetoric," Hyde asks, "if you can't express your ideas and values at the polls?"

If I had to paraphrase Congressman Hyde and challenge this subcommittee today to persuade Congress to pass the 1993 Voting Rights Act Extension, I would ask, "What good are all the black political players in Bo Jackson's Alabama or President Bill Clinton's Arkansas, if these talented players can't express their ideas and values on the field—indeed, if they can't perform well for the fans they represent?"

Thank you.

Mr. WASHINGTON. Thank you, Mr. Gray.

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF JEROME A. GRAY, STATE FIELD DIRECTOR, ALABAMA DEMOCRATIC CONFERENCE

Thank you for giving me an opportunity to testify before this committee and to speak in favor of the need for Congress to pass the Voting Rights Extension Act of 1993. I am state field director of the Alabama Democratic Conference (the Black Political Caucus of Alabama), commonly referred to in our state as ADC. Founded in 1960, ADC is the largest membership-based grassroots black political organization in the state with active county units or affiliates in 64 of the 67 counties.

I would like to begin my remarks with a baseball story I heard at a political meeting shortly after I began working for the Alabama Democratic Conference in 1977. The setting of the story was in the early 1940's during World War II, in a segregated Southern city. At that time blacks were not allowed inside the ballpark to watch the game. Nevertheless, several black boys who wanted to see a ball game went to the ballpark and found a knothole in the center field wall of the wooden stadium. Stooping and squinting with one eye they proceeded to watch the game. From this vantage point, the most they could see was the occasional center fielder running by their limited field of vision, a second baseman, a pitcher, the batter, the catcher, and the umpire.

At first, being able to see this much of the game excited and thrilled the black boys. But as the game advanced inning by inning, a batter finally hit a home run over the center field fence. One of the boys at the knothole caught the ball. He was jubilant, because in those segregated days, if a black boy caught a home run ball, he would be allowed to bring the ball back into the park by the stadium managers.

Well, when the young lad brought the home run ball back into the ballpark, he was astonished by what he saw. For the first time, he saw all the bases. He saw

all the players in the infield as well as the outfield. He saw the bullpen, the dugouts, and the scoreboard. By being inside the park, his awareness of the playing field suddenly grew.

Prior to the passage of the 1965 Voting Rights Act, the awareness of many black citizens in Alabama and throughout the South regarding the game of politics would have been similar to the experience of those young boys watching a baseball game through a knothole in the 1940's. But when Congress made it possible for black citizens to enter the ballpark of politics through the passage of the 1965 Voting Rights Act and made it possible for us to begin to play the game either as elected or appointed officials, some teams began to change the rules of play and fair competition. They developed new policies, practices and procedures restricting the ability of black elected officials to participate fully in all aspects of the political game. Let me give you some examples.

In Huntsville, Alabama, shortly after Dr. James I. Dawson, a member of the Alabama A&M University faculty, was elected to the city school board there, he asked the superintendent to provide him with a copy of the résumés of the individuals she was recommending to the board for jobs in the system. The superintendent refused to provide him with that information, buttressed by the advice of the boards's attorney. Dr. Dawson was told that he was not privy to review the personnel information of job applicants. He protested publicly. He held a press conference. He threatened to file a lawsuit. Still no change. He called me seeking advice on the matter. We requested and got an Attorney General's opinion for him which clearly stated that Dr. Dawson was entitled to review the job applications. The superintendent and school board remained intractable. As a last resort Dr. Dawson filed a lawsuit charging the superintendent with discrimination against him. It took two-and-a-half years before the matter was heard in circuit court in Madison County. But the court ruled in Dawson's favor.

Here was a clear cut case of a majority white school board and superintendent flagrantly violating a written board policy which stated that school board members "are entitled to any and all information they deemed necessary" to determine whether they wanted to vote for or against the superintendent's recommendation in personnel matters. Incidentally, when Dr. Dawson went to court, his lawyer subpoenaed all present and former board members. Under oath, they all admitted that the superintendent had never denied them any request they'd made to review job applications. By the way, Dr. Dawson is back in court protesting the payment of attorney fees. Although he sued the board for violating its own policy—and won, the school board has refused to pay Dawson's attorney fees. On the other hand, the school has agreed to pay the attorney fees for the superintendent who lost.

In 1975 when the City of Montgomery adopted a mayor-council form of government and held an election under a new nine single-member district system, four black candidates were elected to the city council. Their election was sometimes described as "the surprise of '75." However, once the black council members got on board, they were surprised to learn that they could not get blacks appointed to some municipal boards. In time, they discovered that an unwritten council rule gave the majority-white districts a disproportionate higher number of slots in filling vacancies on certain important city boards. In practice, if a white council member in the past had made certain board appointments, that same district would continue to be given deference in filling those positions when new vacancies occurred. This issue has been in the news, off-and-on, for several years. The local newspapers have written editorials condemning this practice. However, the majority-white council has been slow to change in making the present system more equitable. A legislative bill has been proposed to change the appointment system. However, black councilman Leu Hammonds told me that there is still some resistance on the part of some white officials to give each black council member the authority to appoint a member to the water board and the airport authority board.

Or lets's take the Washington County Commission. When we were negotiating to get a majority-black district there for the first time in 1992, the four white incumbent commissioners spent considerable time discussing the difficulty they would have in financing a new majority-black fifth district operation. While we advocated for a unit system which we felt would be more cost efficient, the white commissioners were wrangling over who would give the newly-elected black commissioner some of their hand-me-down equipment. Little concern was given to the black commissioner being able to participate in the discussions. Well, black Commissioner Willie Dixon was elected last November. And here are some things that have happened to him since he entered the ballpark. He did get an equal share of the road and bridge money in the budget. All five Commissioners received $241,000 each. On its face, the deal sounds fair. But here's the catch. Willie Dixon had to use some of his R&B money to buy new equipment. He had to buy a new truck and a new

grader. Unfortuately, he could not afford to buy a front-end loader because the cost was prohibitive. It will take Dixon three years to save up enough money to do that. Anyway, being neighborly, he asked two of his fellow Commissioners to give him "one of the three loaders" they had in their districts. However, when the vote was taken in a commission meeting to transfer a grader from one of the white districts to the majority black district, the vote was 2 for, 2 against, and one abstention. Willie Dixon didn't get that grader. By the way, Dixon asked me to be sure to mention that he did not get any of the money which the district Commissioners brought forward from the previous fiscal year. Also, the way he got his working crew was unusual. Once Dixon got elected, the county disbanded a road and bridge crew which had been working throughout the county. That crew of men along with some old equipment, was given to the black commissioner. The only person Dixon was able to hire was his foreman.

In Dallas County, with a black population of 57.81%, and where Selma, Alabama is the county seat, the two black members on the five-member school board are having a rough time. Black board member William Minor told me recently that the board adopted a new travel policy in February 1993, placing a limit of $1,500.00 per year, for members to travel to professional meetings. Minor believes the reason the new policy was adopted was due to the superintendent not wanting the black board members attending out-of-state meetings. According to Bill Minor, there were no restrictions placed on travel before the black members came on board. Incidentally, Minor stated that his requests to get the board to establish a board personnel committee to review hirings, firings, and promotions have not met much favor. Minor said that the superintendent did appoint him to a two-member personnel committee. But the committee, though sanctioned on paper, has never functioned. Minor says he has never been afforded an opportunity to participate in an on-site interview with a prospective job applicant in the majority black Dallas County.

A brief word about Charles Satchel, a black school board member in Lawrence County. Charles is beginning his second six-year term as a board member. In talking with him, he is disturbed over the practice of the superintendent who always polls the board members on Friday before the meeting on Monday to see if he can get at least three board members to agree on all proposed action items before the agenda is set. Satchel says the superintendent will refuse to put an action item on the agenda if he doesn't have the three votes to adopt it. As a result of this practice, Satchel stated that he usually is outvoted 4 to 1. As a board member Satchel told me that he has never been allowed to review any job applications. And that when the superintendent makes a recommendation to fill a vacancy, he presents only one name for the position. In reference to the closing of a school in the black community, Satchel opposed the move. However, Satchel believes his wife was appointed principal at the new school, probably as an overture to get him to shut his mouth, he says. When the vote was taken on closing the school in the black community, Satchel observed that only one white board member voted with him to keep the school open. The white member told Satchel: "I fooled you, didn't I, Charles?" Of course, Satchel believes that token vote had been pre-arranged.

In my hometown of Evergreen, Alabama it has been customary for white council members to be given deference when they recommend residents in their districts for various board appointments. Recently, however, when a black council member, Elizabeth Stevens, recommended a black resident of her district to be considered for a board appointment, she was not given deference. Instead, a white member of the council was successful in getting a white resident in the majority-black district appointed to the board in question.

This scenario of not giving political deference to black elected officials is fairly common throughout Alabama, especially in municipalities that have their own school systems and where blacks have been successful in getting elected to the city councils from majority-black districts. Since most city school boards in Alabama are appointed by the elected council members, the wishes of black council members often are frustrated when their recommendations for school board seats are ignored or when they get outvoted by a white majority council. Attorney James Blacks her, who is here with me today from Alabama, has cited in his testimony what happened in the City of Talladega when the process for hiring a new school superintendent seemed flawed and discriminatory.

Without question, the net effect of these rules changes, practices, policies, or procedures affecting the aforementioned black elected officials as well as countless others, is akin to black ball-players being allowed inside the park in their uniforms, but being denied the opportunity to play a good game at their designated positions after the umpire yells, "Play Ball." Indeed, many black elected officials have come to their "field of dreams" only to watch their dreams fade because they aren't allowed to play. In my opinion, something is wrong with a system that encourages

a black citizen to try out and make the political team, and then treats that individual as though he is on the injury reserved list. Also, if black political players are forced to sit in the dugouts or the bullpens and watch their white teammates play ball and score all around them, in time they will lose interest in the game—and so will their fans.

In June, 1981, this subcommittee composed of Congressmen Don Edwards, Henry J. Hyde, and the late Harold Washington came to Alabama and held a field hearing in Montgomery, to receive testimony from witnesses in the South regarding the importance of extending and amending the 1965 Voting Rights Act. That was a great day for many of us for several reasons. First, you brought Washington to Alabama. Second, you listened well. Third, you heard the cries of injustice and denial of voting rights. And fourth, you responded promptly and positively by giving our nation and our state a stronger amended version of the Voting Rights Act in 1982. Although I was not a witness in 1981, I was an integral part of that field hearing—working with the subcommittee's staff and the NAACP's Washington Bureau Chief, Mrs. Al Thea T. L. Simmons, in helping several Alabama witnesses to prepare their testimony. Without sounding boastful, somehow I knew that once the subcommittee heard the testimony of the Alabama witnesses, the members would come back to Washington and convince a majority of their colleagues to support the 1965 Voting Rights Act Extension in 1982. That happened.

Because this subcommittee did its work so well more than a decade ago, you are responsible for black people having the opportunity to play ball in many political ballparks throughout Alabama today. In 1981, Alabama had only 247 black elected officials. In 1993, our state has more than 700 black elected officials. Indeed, we're proud of the fact that our state is first in the nation in the number of black elected officials as reported in the last *National Roster of Black Elected Officials,* published by the Joint Center for Political Studies. The gains we've made since 1982 have been dramatic. The Alabama Democratic Conference teamed up with an outstanding Birmingham legal duo, namely Attorneys James U. Blacks her and Edward Still, and mapped out a statewide, comprehensive legal strategy whereby at-large elections were challenged in approximately 180 jurisdictions. What is most remarkable about the gains is to see how closely the black electoral successes mirror the black voting age population in the state. The summary which I've listed below illustrates my point.

Blacks as a Percent of voting age population, *22.73%.*
Percent Black Commissioners Statewide, *22.79%.*
Percent Black School Board Members Statewide, *23.32%.*
Percent Black Council members, *20.59%.*
Percent Black Legislators, *17.14%.*
Percent Black among all Elected Officials, *16.36%.*

In closing, I'm reminded of a question raised by Congressman Henry J. Hyde, in a wonderful op-ed piece which he wrote that was published in the Sunday, July 26, 1981 issue of *The Washington Post.* The Hyde editorial, titled "Why I Changed My Mind on the Voting Rights Act," came on the heels of the Alabama hearings. Congressman Hyde admitted that he came to Alabama with the conviction that 17 years was long enough to keep jurisdictions covered by Section 5 in the "political penalty box." Moreover, it was Hyde's view that the federal courts and not an administrative arm of government should be the proper vehicle for citizens' redress if voting rights abuses continued. But fortunately, once the Alabama hearings began and the witnesses had their say, Hyde realized that what ought not to be compared to what often is the true state of affairs, he changed his mind and became a supporter of extending the 1965 Voting Rights Act. Hyde's concern for the issue of federal intrusion into the affairs of state faded when he compared that to the importance of the political and voting process being accessible to all.

Therefore, his question: "What good is all the political rhetoric," Hyde asks, "if you can't express your ideas and values at the polls?" Finally, if I might paraphrase Congressman Hyde and challenge this subcommittee to persuade Congress to pass the 1993 Voting Rights Act Extension, I finally ask: "What good are all the black political players in Bo Jackson's Alabama or President Bill Clinton's Arkansas if these talented players can't express their ideas and values on the field—indeed, if they can't perform well for the fans they represent?" Thank you very much.

Mr. WASHINGTON. General Bowers, I want to go back to the point that you were making, and I think I speak on behalf of all of the members of the subcommittee, and indeed, the full committee, and, I am certain, the Congress.

We are not unmindful of the fact that unfortunately from time to time, there are things that we find are necessary to do here in order to ameliorate what happens out in the real world that do cause hardships, particularly paperwork and things of that nature, and so-called unfunded mandates on local and State governments.

Being a product of 17 years of service in the Texas Legislature, I remember giving many a speech where I was cursing Congress, not literally, but figuratively, between my teeth for something that they did, such as making us reduce our speed limit to 55 and the like.

With the benefit of hindsight now though, I think that that was perhaps wise of Congress. That is not because I am in Congress. I think there is plenty of evidence that it did save lives by mandating that States reduce their speed limits from 70 to 55, or at least in Texas, or suffer the loss of Federal highway trust funds.

You call our attention to language, specifically, in your testimony and your summary here. You complain about the language that attempts to rectify the improvidently decided, in my opinion, case by the U.S. Supreme Court with respect to the county commissioner. I believe that is called the *Presley* case.

You suggested the net is too big in order to accomplish that. As I said, I am not unmindful of that complaint. You specifically talk about transfer of decisionmaking authority that affects powers of an elected official or position.

I certainly am not authorized to speak on behalf of the chairman or the other members of the subcommittee, and I apologize. There are a lot of things, as you all know, going on. There are a lot of votes on the floor that I am missing, because I think this is more important.

You have all traveled here a great distance in order to be heard and to have a record made. So I sort of gave up my right to vote so that the other members could go and do that. You can be assured that they are interested in your testimony.

Can you think of a way, General Bowers, in which we could accomplish what you agree that we need to accomplish, which is to rectify the possibility of a situation—and I don't like to deal with specific cases, because we all know as lawyers that hard cases make bad law, sometimes.

However, in a situation where, like Ms. Gutierrez pointed out, and as you made reference to in your testimony, it is clear, or least obvious on the face, that the rules have been changed because the players are changed; that is not fair.

What we want to do is try to make the Voting Rights Act fair. I think as Mr. Blacksher appropriately pointed out, Congress passed it and the courts have interpreted it. We think that they have misinterpreted it. We have the right to correct their interpretation under the separation of powers.

The Congress has the right, when the judicial branch misinterprets the intent or the effect of a law that we pass, because they are better lawyers than we are. So if we did not think of every possible situation or scenario that could lead to a result that was not intended, and we think, unwarranted on our behalf, it is not only

our right, in my judgment, but it is our duty to correct that misinterpretation, so that we do not ever have a case like *Presley* again.

This is because we want to make it clear that what the Voting Rights Act is intended to do is to put a level playing field in. You and I know, or all three of you know, from being out there in the real world, the people are not fooled by these legal niceties.

You know, in criminal law, sometimes we call them legal technicalities. The whining and complaining about what the Voting Rights Act means could be interpreted by those who want to see it enforced as being legal technicalities.

I want to meet you halfway. If you can, help us come up with a way by which we can let you out of the trap, because we don't want you, and you are not what we are interested in.

We are interested in insuring that when these county commissioners or these city councils or these school boards start changing the rules that they have been going by for a long time, and as long as there are only white people there, and you put a black person or Hispanic person—or a white person, for that matter—on a majority black board up there—and you know how frustrating it would be to sit there and see the papers shuffling up and down the table, and all you can do is every once in a while second a motion—well, you do not get elected to a public office just to do that.

Help us find a way, General, to write you out of this provision, but make it strong enough to make it clear, as Mr. Blacksher said. This is because it is really what we say that is more important than what we do. There must be leadership in this country.

There must be a clear signal that we "ain't going to cotton to that," like we say down in Texas. All of us, as lawyers who love the Constitution and love the law, and all of us, as citizens, who believe in our Constitution, and who believe in our laws, intend to make sure that nobody has to peep through the knothole.

Can you help us come up with some language?

Mr. BOWERS. I don't have anything off the top of my head, sir. I, like you, have the utmost of faith in this country. If you will give us a chance, we will work with you and try to accomplish that. If we can accomplish that, the money the State of Georgia paid in sending me up here will have been more than worthwhile.

Mr. WASHINGTON. Yes. Because I believe, as do you, General, that the bottom line is, that the tie ought to go to the runner. If we can come up with some better language that accomplishes that purpose and does not throw the net out too far, then we will do it.

But if we cannot, I think it is better to err on the side of making sure that this lady and others like her do not have to suffer. Maybe it means a little bit more paperwork for you, or maybe we will have to come up with some more money to help you pay for it.

We pay for a lot of other things around here. We could probably spend the cost of the tire off of a B–2 bomber and pay for all of the paperwork for every attorney general, and every local unit of government in the whole United States would be able to meet the requirements of submission under section 5 of the Voting Rights Act.

But what I am saying to you is, we are not overlooking the fact that we are creating burdens.

Mr. BOWERS. Sir, if you will permit me——

Mr. WASHINGTON. Yes, sir.

Mr. BOWERS [continuing]. On the paperwork burden, I felt that was something that you needed just to be aware of.

Mr. WASHINGTON. Yes.

Mr. BOWERS. What I am more concerned about is the degree of intrusiveness in local and State government. I am not up here to beat that old saw.

Mr. WASHINGTON. I understand.

Mr. BOWERS. I am up here to try to convey to you what I believe to be a legitimate concern about rule from Washington.

Mr. WASHINGTON. Right.

Mr. BOWERS. You don't want that.

Mr. WASHINGTON. No.

Mr. BOWERS. I mean, the States, the cities, the counties are crucibles of experiment, but it has got to be done right. It cannot be done the way it was done to Ms. Gutierrez.

If you will, just give us a chance. It may be that the arena to do this is somewhere else other than section 5. I will devote the utmost of my effort and that of my staff to try to come up with something, as you say.

Mr. WASHINGTON. Thank you.

Mr. BOWERS. Certainly. Thank you.

Mr. WASHINGTON. Mr. Blacksher, I have just one question for you. Do we need to do something other than what we are doing?

There are two things at work here, it seems to me. There is not only the letter of the law and the willingness of people of good will to follow it, but it seems to me there is a broader message that we need to get out.

I am particularly concerned about young people across this country. We create a climate in which I, in my judgment, think we breed contempt and disrespect for the law, by misinterpretation of the law. I always thought that civil rights laws, in general, were to be liberally construed so as to carry out their ultimate purpose.

However, some of these interpretations amount, at least in my view—and I admit that my view is slanted and is affected by the upbringing that I had, growing up down in Houston, TX, and having seen so many injustices in my life. I am not a prejudiced person, though, I promise you. However, one who fails to change as a result of experience is a fool, in my judgment.

But I view these things the same as George Wallace standing in the school house door. To me, you have a law. The Supreme Court said in *Brown* v. *Board of Education* that separate but equal schools are unconstitutional. Then you have a figure of government thwarting the very application of that law.

Then we go from there, as you pointed out in your testimony, to the poll tax, and the white primaries. I followed that from Houston, TX. There were a lot of these cases, such as *Sweatt* v. *Painter*, and that was the reason that the law school that I went to was ever created. This is because they did not want to let black people go to the University of Texas Law School.

So I have watched these things over the years. Meanwhile, I was always keeping my eye on the Constitution, loving every word of it, and having to tell some of my brothers that I want to go on the

street and bomb and tear things up that, "That's not the way to go. Believe in the justice system and go to the courthouse."

It gets frustrating when I hear somebody like Ms. Gutierrez have to go through something like this, and I know it did for all of you, too. My point is, and it has nothing to do with your testimony, what else can we do beyond that—beyond making these corrections and then knowing the lawyers are going to come up with something else to drag their feet with.

They went to the at-large system after *Baker* v. *Carr* was decided. *Baker* v. *Carr* said, if you are going to have districts, they have to be uniform in size and population. They knew that that was going to lead to the election of minority people, so they wiped out the district system and created an at-large system, and that was supposed to be fair to everybody. Then they had to come back in the Voting Rights Act.

How many more of these wickets are we going to have to go through? How many more of these hurdles are we going to have to jump before we get to the day where people stop doing this to each other? What do people who are elected to Congress, like us, need to be doing and saying in order to ensure that the people understand that we are tired of it?

Mr. BLACKSHER. Mr. Washington, in my opinion, the most important thing you can do with this particular piece of legislation is to make it clear—not necessarily by changing the proposed language of the statute itself, but certainly in the legislative history—that this language is intended to reaffirm the meaning of voting, as Congress always intended it, and not to expand its meaning in any way.

This is because of the genius the Voting Rights Act, which is the most extraordinary piece of civil rights legislation this country has ever passed. I might remind you, and I often point out, that the 1982 Voting Rights Amendments are probably the first civil rights law ever adopted in this country with the direct participation of representatives of African-Americans.

Mr. WASHINGTON. Yes.

Mr. BLACKSHER. The most important thing about the Voting Rights Act is its open-endedness, its refusal to engage in a limits setting, and trying to find bright lines that define injustice here or justice on the other side. Refusing to abandon the point you were making, the notion that no matter what we think we have done today to corral injustice in one spot, it is going to come up again in another spot.

This is because the enterprise that the Voting Rights Act is engaged in is very ambitious. It is trying to bring justice to the political process and to the political thicket.

All of us who work in the political process and the political thicket, know there is simply no end to the situations that raise new questions about what is fair. Fairness, itself, very much depends on the particular facts.

I, too, for example, believe that we ought to promote majority rule in State rights where those important principles promote justice and not injustice. That is the genius of the Voting Rights Act. It does not take a position on what particular form of government or particular rules constitute justice; but rather, it takes a position

on whatever rules are being used, that they be used in a racially just manner.

So the important thing, it seems to me, for this piece of legislation is to make it clear that the Supreme Court simply missed the point of the original Voting Rights Act. This is nothing new, but this is simply reaffirming where we have been going all along.

As for Attorney General Bowers' concern about the administrative burdens and the difficulty in deciding which of his 700 1992 Georgia laws would be covered by an amendment of this sort, I would simply remind you that the next item of genius in the 1965 Voting Rights Act has been the delegation by Congress to the Attorney General of working out the precise limit and the precise coverage of the act, as it applies to particular circumstances.

The procedural history of what happened in the *Presley* case is a perfect example of the Attorney General saying, we cannot say, with enough generally, exactly which transfers of authority implicate voting. However, we do know that it occurred in Etowah County, AL, and in Russell County, AL.

It advanced the meaning of practices that implicates voting in a way that was understandable to the governments that had to comply with the law. So it is by regulations and by day-to-day administration of the act that the Attorney General makes sure that both the spirit of the law, and the process of self-government and democratic participation is being observed without abuse, and also, that it is not getting into routine legislative decisions.

It is not getting into simple legislative choices, but into the institutional ways that those choices can be made. It is easy for me to say that. Then we all started managing the very circumstances that would test our ability to apply that to particular facts.

But if you abandon the enterprise to keep the act open-ended, and making sure that its spirit moves, and that you don't constrain it with particular rules—if you abandon that, you have lost your chance for progress.

I think that the record, for the last almost 30 years now, shows that the administration of this law by the Attorney General makes it possible to sort out the wheat from the chafe. There are just not that many of these laws, I suggest, that affect in any fundamental way or in any institutional systematized way, the powers of elected officials. A budget does not, does not do that, and the Solicitor General said so to the Supreme Court.

So even saying no, this amendment excludes budgets, is asking for trouble. This is because although we agree in ordinary circumstances that is true, we can all imagine, if we sit here long enough, circumstances where budget after budget after budget or a particular budget is so outrageously skewed, clearly, to exclude a minority representative from any influence in government, that that would implicate the voting rights of that representative's constituents.

The Justice Department is very vigilant about it. It is not anxious to broaden the categories of changes that it has to supervise.

But, again, the most important thing is, struggling along to apply these general principles to particulars has the great benefit of letting elected officials, politicians, and the public everywhere know that there is a standard of fairness that our everyday decisions

have to live up to. It keeps that principle in front of us as sort of a guiding beacon. That is the important thing about the Voting Rights Act.

So, again, my only point would be, the way to strengthen this bill would be to make it clear that it is not anything new. It is simply a reaffirmation of what was there all along.

Mr. WASHINGTON. I thank all of you for your testimony. I am going to yield back to the chairman.

I am concerned, as recently as yesterday, the other body had an amendment that was adopted. This was on the motor-voter bill, which limits its applicability to poor people.

This is again creating two classes, because the amendment was adopted in the other body which, of course, has to go to conference. I hope that we will be vigilant in insisting upon the House language.

That drives a wedge between the method by which citizens should register to vote, and eliminates the ease of access to the political process for those who would have registered through the unemployment offices in the various States or the welfare agencies in the various States.

This is again making it clear, at least to those who favor the amendment, that there is some distinction to be drawn in those who would register through their driver's license, as opposed to others.

There is also a provision that, I think, creates at least a possibility for discrimination against people who may look like they may have been born in some other country.

This is particularly true for those who may appear to be of Hispanic extraction, by allowing the States in the implementation of this motor-voter bill, if it were to pass and become law in that form and be signed by the President, to make further inquiry of individuals as to whether they are citizens of the United States.

Of course, the argument made to support that was that this prevents fraud in the exercise of the franchise. It also, of course, defeats the possibility of being able to register by postcard.

This is because if a State passes a provision that allows the voter registrar to inquire further of persons who apply to vote, then it defeats the possibility of being able to register by mail. The point is that we have to be eternally vigilant.

I thank all of you for your testimony. I would like to especially thank you, Mr. Blacksher; although I know that you do not need my thanks.

I know that as a lawyer, out there in the real world sometimes, you don't get the thanks that you should get from the people that you help the most. They appreciate you. They take the benefit of your work, and they apply it in a very meaningful and real way when they go and vote.

So as one lawyer to another, thank you for upholding the true meaning of the Constitution, as I understand it. God bless you in your work.

Mr. BLACKSHER. Thank you, Mr. Washington.

I should have said, also, and I meant to say at the beginning, how sorry I am that Coach *Presley*, my client, can't be here. Coach *Presley* died in January of this year. He was a great champion. The

problems that you heard from Ms. Gutierrez could have been heard from his lips as well.

Mr. WASHINGTON. He had a good lawyer, though.

Mr. BLACKSHER. Thank you.

Mr. WASHINGTON. I will turn it back over to you, Mr. Chairman.

Mr. EDWARDS [presiding]. Thank you, Mr. Washington. I apologize to you and to the witnesses for this business that is going on down on the floor and for the responsibilities that I had that I could not escape from.

It is just beginning over there. Mr. Washington, in case you want to make the next two votes, you now have time. Then there will be half a dozen or maybe more in the morning. We have a really adversarial situation going on. It is democracy at its best or worst; whatever way you want to call it. It is rather historic, anyway.

I am sorry that I was not here for all of your testimony. I know your testimony was very good, and we appreciate it.

Mr. Gray, do you think that this bill would resolve the situation that Ms. Gutierrez described so eloquently?

Mr. GRAY. I do. But when I cited the example of Dr. James Dawson, I could not help but think that if this bill had been in effect, he would not have had to go through the costly court fight to get verification on something that, on board policy, the board already had in place.

All he would have had to do was get a letter from the Department of Justice. That, in effect, would have acted as law, and the boards would have gone on and done what I would think would have been the right thing. Absent of that, he had no other option but to go into court.

Mr. EDWARDS. Well, what happened to Ms. Gutierrez, was it the classical case that we think of with regard to this legislation? Was she stripped by a vote of the body of her responsibilities, or was it just plain insults and discrimination and racism?

Mr. GRAY. I certainly see it that way. Of course, we hear similar stories from black officials in Alabama, who have the same thing happening to them.

In my written statement, I think I gave an example of one board member in Lawrence County, where he told me of a board practice whereby the superintendent would not even allow any item to be put on the agenda for action, unless he has three votes to get that item passed.

So that, in effect, virtually isolates the black board member. This is because if he does not have two other votes for things that he would like to have put on the agenda for action that he thinks he can get adopted, they won't, because that has been the practice the superintendent has put into place.

In another instance over in Valley, AL, a city council member, Robert Whitaker, told me in that instance where the mayor has instituted a practice whereby before the board meeting, he seeks to get a consensus from a majority of the board members for any votes that are going to be taken.

Mr. EDWARDS. Let me interrupt just a minute.

Mr. GRAY. Yes.

Mr. EDWARDS. Mr. Bowers, you have a 2:15 airplane?

Mr. BOWERS. Yes, sir.

Mr. EDWARDS. We don't want you to get hurt on the highway. So, thank you, again, for being here.

Mr. BOWERS. Thank you. It has been an honor to be here, sir.

Mr. EDWARDS. Continue, please, Mr. Gray.

Mr. GRAY. Yes. The mayor insists on this practice of getting a consensus from the majority of the council members before the votes are taken in the body.

Of course, Mr. Whitaker said that he does not like that practice because he wants the citizens who elected him to be able to hear him discuss and debate issues in the council chamber, and not feel that he just simply comes and ratifies a preagreed to decision that the council has made before the council meeting.

Mr. EDWARDS. Thank you.

Well, of the two witnesses left, there is the consensus, then, that we are doing the right thing in trying to enact this bill; is that correct?

Mr. GRAY. Absolutely.

Mr. BLACKSHER. That is correct.

Mr. EDWARDS. I understand that there are other cases out there pending or about to happen where this precedent of the Supreme Court could cause great damage; is that correct, also? Have you heard of some other cases?

Mr. BLACKSHER. There are other cases that I described in my written testimony, in fact, that I am involved in.

The *Presley* case, itself, is back on remand from the Supreme Court, going forward on the original section 2 issues, as well as the 14th amendment, title 6, and everything else we can find as a claim to try to challenge with the plaintiffs carrying the burden, the injustice that has gone on in Etowah and Russell Counties.

The problem there is, even though the *Presley* decision did not involve section 2 of the Voting Rights Act, it is the policy message that the Supreme Court sent, that I was speaking about earlier; that Congress doesn't mean for the Voting Rights Act to be used in the context. That has completely transformed in the environment in which we have to pursue these problems.

Mr. EDWARDS. How do you respond to Mr. Cooper who said you do have a remedy, and you can turn to the 14th amendment, equal protection?

Mr. BLACKSHER. I responded to that in my written statement, too.

Mr. EDWARDS. I'm sorry, I wasn't here to hear that.

Mr. BLACKSHER. Of course, there is a remedy. First of all, there are the problems of the burdens of proof, the expense of litigation, access to lawyers, access to courts.

Then there are the additional questions. You see, the Voting Rights Act is not just an antidiscrimination law. As I frequently say to judges in my voting rights cases, the Voting Rights Act is not about whether white folks can govern fairly. This is because, frankly, we can, occasionally, and we do, and we are proud of it.

The question is whether black folks get to govern at all, and whether they get to participate in that process. So whether the decisions are discriminatory or well-intended, foolish, or wise, the process of democracy says that all citizens of the State or the local jurisdiction ought to have the opportunity to participate in deciding

what those decisions will be. That is the difference between the Voting Rights Act, the 14th amendment, and the 1983 act.

Mr. GRAY. Congressman Edwards, if I could, I would like to make a comment, too, on what Mr. Blacksher just said.

Several weeks ago, he and I were over in Russell County, trying to see if we could work out an agreement with the Russell County Commission. Of course, their lawyer said in the conference with the commissioners all present that he felt confident that if the case went to trial that they would win, based upon the *Presley* decision.

Of course, we were trying to think of ways that we could not go into court, because really we were afraid that he might be right. We discussed the possibility of coming up with some type of consensus government on that body by recommending a committee structure be put into place whereby at least the black-elected officials will have an opportunity to really get involved more in the mix in terms of discussions.

This was so that when they come to a county commission meeting, they won't just be presented with an agenda, and they have to vote on it. Before that even happened, they would have an opportunity to be on important committees to help reach consensus regarding the items that would be put on the agenda.

However, what has happened heretofore is that blacks have not even had an opportunity, many times, to get involved in that kind of mix, so we have been trying to think of other ways, kind of like what you have here in Washington, to put together some type of committee system whereby that would happen.

I think once they hear from Washington regarding the Voting Rights Act fixing this hole, then I think you will see a different behavior and, I think, one or two instances of the preclearance review where the other jurisdictions know and hear that you must do this or you can't do that.

It would prevent them from doing a lot of bad things. I think that is the great thing about the Voting Rights Act, that once it gets in place, it stops a lot of that activity that they might be inclined to do, if you didn't have it there.

Mr. EDWARDS. That is a very wise observation.

The lights are on up there, and we have to go. We thank you very much.

Again, I want to thank Mr. Washington. He came to Congress a few years ago as the best trial lawyer in Texas, and he has lived up to that reputation five or six times over.

This winds up our hearing. We expect within a very few days to mark up the bill and take it to the full committee. Your testimony has been very useful.

The hearing is adjourned.

[Whereupon, at 1:50 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

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